IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1976

NO. **76-200**

TEXAS EDUCATION AGENCY
(Austin Independent School District), et al,
Petitioner

V.

UNITED STATES OF AMERICA, et al,
Respondents
MEXICAN-AMERICAN LEGAL DEFENSE & EDUCATIONAL FUND, et al,
Intervenors-Respondents
DEDRA ESTELL OVERTON, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al,
Intervenors-Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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LIST OF AUTHORITIES

CASES

UNITED STATES STATUTES

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The Austin Independent School District petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 532 F.2d 380 and is reproduced in the Appendix at 1. The order overruling Petitioner's Petition for Rehearing En Banc was entered on June 9, 1976, without opinion. The Memorandum Opinion and Order of the United States District Court for the Western District of Texas, Austin Division, entered on August 1, 1973, is unreported, and is reproduced in the Appendix at 44.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). This petition for certiorari is presented within 90 days of the date of the judgment of the Fifth Circuit.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that school districts are constitutionally prohibited from using neighborhood school assignment if the school districts contain ethnically concentrated residential areas, even though the use of neighborhood assignment is for non-discriminatory, educational reasons?

2. May a Court require a remedy involving extensive further transportation of younger elementary school children to obtain greater desegregation despite District

Court findings, not held to be clearly erroneous, of adverse consequences to the children's health, safety, and education that would be caused by the increased transportation?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved in this case and are set forth in the Appendix: (a) Fourteenth Amendment to the United States Constitution; (b) 20 U.S.C. §§1701; 1702(a)(4) and (5); 1704; 1705 and 1707; and (c) 42 U.S.C. §2000c-6(a) and (b).

STATEMENT OF THE CASE

A. *Description of the School District and its Policies*

The Austin community is a tri-ethnic community and has been for many years. It has effective tri-ethnic representation on the governing boards of its school district and city government. Unlike integration in many northern and southern cities, school integration in Austin has gone smoothly. Austin commenced efforts to comply with *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*) almost immediately after this Court rendered its opinion.[1]

[1]On August 8, 1955, while most of the country continued to respond to *Brown II* by doing nothing, the School District adopted a plan to

The Austin Independent School District (hereafter "School District") encompasses the City of Austin, Texas, and adjoining areas outside the city. During the 1975 school year, the School District had approximately 59,000 students and 79 schools. The School District educates approximately 15 percent black, 23 percent Mexican-American and 62 percent "Anglo" (non Mexican-American whites) students. The City of Austin is bisected north and south by a major expressway (Interstate 35) and east and west by the Colorado River. The few bridges crossing the river are located near the center of the city. Along the west side of Interstate 35 and in the center of the city are the downtown area, the state offices complex, and the University of Texas. Few major east-west streets cross this area. As in other urban areas with significant ethnic populations, Austin's ethnic groups have tended to concentrate their residences in particular sections of the city. Generally, most blacks have resided in the area east of Interstate 35, near the center of the city. Most Mexican-Americans have resided south of that area, and Anglos have resided in west, south and north Austin. The areas of black and Mexican-American concentrations have expanded and shifted over the years.

Until the start of court ordered desegregation, no extensive bus transportation system was used by the School District. The School District has used a neighborhood assignment policy throughout its history, except as to

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desegregate the school system beginning with the high school level. The plan worked well enough that in 1963, integration was extended to the entire District at one time. During the Sixties, the Department of Health, Education and Welfare by numerous letters certified that the School District was in compliance with the Civil Rights Act of 1964.

black students during the time state statutes required separate facilities. During that period, Mexican-Americans were always treated as white for the purposes of statutory segregation. No statute, School Board regulation or policy ever required segregation of Mexican-Americans, and in fact, Anglos and Mexican-Americans have attended school together virtually at all times.

B. *Procedural History*

On August 7, 1970, the United States filed suit, pursuant to 42 U.S.C. §2000c-6(a) and (b), against the School District (and other school districts) alleging segregation of Mexican-Americans and alleging that prior segregation of blacks had not been fully remedied. A trial was conducted thereafter, and the Court on June 28, 1971, issued a Memorandum Opinion and Order in which it found no *de jure* segregation of Mexican-Americans, but that some all-black schools survived as vestiges of the prior dual system. App. 74. On July 19, 1971, the Court entered an order for the implementation of a plan to remedy these remaining vestiges. App 58.

The United States appealed these orders to the Fifth Circuit, and certain individuals represented by the National Association For The Advancement Of Colored People (NAACP) and by Mexican-American Legal Defense & Educational Fund (MALDEF) were allowed to intervene in the appeal. The Fifth Circuit considered the appeal *en banc*, with 14 judges participating. On August 2, 1972, the Court issued seven opinions. 467 F.2d 848-891 (*Austin I*). One-half of the judges did not reach the merits because of the pendency of *Keyes v. School Dis-*

trict No. 1, 413 U.S. 189 (1973), (then undecided), but because the Court was evenly divided, they joined with an eighth judge in voting to remand the case to the District Court without deciding the merits of the Mexican-American issue. *See* Judge Godbolds' opinion, 467 F.2d 889, and Judge Bell's majority opinion, 467 F.2d 883. The other six judges would have reversed the District Court on both the Mexican-American issue and the remedy issue. *See*, Judge Wisdom's opinion, 467 F.2d 852.

C. *The District Court's Opinion*

On remand, the District Court heard 12 days of new evidence and reconsidered the evidence from the prior trial. After the trial was concluded, but before a decision was reached, this Court rendered its decision in *Keyes*. On the basis of its reading of *Keyes,* the District Court held that the School District, because of past *de jure* segregation of blacks, had the burden of showing that there had been no *de jure* segregation of Mexican-Americans. The Court then held that the School District had sustained this burden. App. 50. On the issue of alleged segregation of Mexican-American students, the District Court noted that one senior high school, two junior high schools, and eight elementary schools in Austin educate disproportionate numbers of Mexican-Americans. This statistical imbalance was found not to result from any statute, rule, regulation or policy of the School District prohibiting Mexican-American students from attending schools with Anglos, and not to be in any way related to the maintenance of the previous statutorily mandated black-white dual school systems. While during the first half of this century the School District had provided three special schools

to serve the educational needs of non-English speaking students and the children of migrants, the Court noted there was no requirement that Mexican-Americans attend these schools. The Court found that the existence of these schools represented no more than a "humane and compassionate" attempt to meet the special educational needs of children who would otherwise have been much more severely handicapped in their efforts to obtain an education.

Searching further for the causes of the racial imbalance, the Court noted that five of the now predominantly Mexican-American schools had originally opened with a majority of Anglo students but because of shifting residential patterns, had become schools with concentrated Mexican-American student populations. Those schools which had opened with Mexican-American majorities were located in response to growth in the area, but because of natural physical barriers tending to isolate East Austin could not readily serve other areas outside or adjacent to it. The Court found that in no area of its responsibilities had the School District ever acted with segregative purpose or intent toward Mexican-American students.

The Court's task of fashioning a remedy to eliminate any remaining vestiges of the statutory segregation of blacks was made easier because of the already complete integration of grades seven through twelve, primarily by busing, and a substantial number of integrated elementary schools. The Court found that the sixth grade could be integrated through the establishment of sixth grade center schools, but that additional integration of lower grades would involve "progressively massive transportation, the

uprooting of children in their earliest formative years, and would be educationally dysfunctional." The Court further found that "the time required for transportation, risk to health, and probable impingement of education of students younger than the sixth grade would be prohibitive under any such plan." App. 53. After considering all aspects of the situation, the Court ordered the adoption of the Sixth Grade Center Plan and held that, combined with the previous plans and other steps ordered by the Court, Austin would have achieved the greatest degree of desegregation possible, taking into account the practicalities of the situation.

D. *The Court of Appeals' Opinion*

The United States and the Intervenors appealed. Judge Wisdom, the author of a minority opinion in 1972, wrote for the panel, reversing the District Court's holding that there had been no *de jure* segregation of Mexican-Americans by the School District. The Court "conformed" its prior opinions to this Court's holding in *Keyes* and "inferred" that the School District intended to segregate Mexican-American students by its use of neighborhood schools. The Court made no determination that the District Court's findings of fact were "clearly erroneous," as is required for reversal by Rule 52 of the Federal Rules of Civil Procedure, but, instead, adopted a legal theory—that neighborhood school assignment in areas of Mexican-American residential concentration is in itself unconstitutional—that made the District Court's factual findings irrelevant. The Court held that "school authorities may not constitutionally use a neighborhood assignment policy creating segregated schools in a district with ethnically segregated residential patterns." App. 20.

Shifting its attention to the remedy issue, the Court held that the plan approved by the District Court was inadequate because it did not require mixing of all blacks and Mexican-American students with Anglos. After a cursory review of the School District's objections to the so-called "Plan" put together by an expert for the Intervenors, the Court dismissed the School District's objections saying that they were either inconsequential or could be remedied on remand. The Court concluded by ordering the District Court to draft a comprehensive tri-ethnic desegregation plan that conforms to one of the approaches outlined by the Intervenors' expert. The case was reversed and remanded to the District Court.

REASONS FOR GRANTING THE WRIT

I.

THE FINDING OF *DE JURE* SEGREGATION BASED ON THE ETHNIC IMBALANCE CAUSED BY NEIGHBORHOOD SCHOOLS.

The question presented by this case is, quite simply, the constitutionality of the use of neighborhood school assignment—assignment of students to the school of their level closest or most convenient to their homes—in areas of racial or ethnic residential concentration where racially or ethnically imbalanced schools result. Because racial or ethnic residential concentration exists in almost all urban and many non-urban areas and because the many advantages of neighborhood school assignment have made its use nearly universal, this question is undoubtedly the most important question in school desegregation litigation

today, and it may well be the most troubling question facing the country. The holding of the Court of Appeals for the Fifth Circuit that the use of an ethnically neutral policy of neighborhood assignment in areas of Mexican-American concentration establishes *per se* unconstitutional or *de jure* segregation requiring a remedy is in direct conflict with the decisions of other Courts of Appeals and in accordance with the decisions of still others. Finally, it is in conflict with the Congressional declaration of policy in the Equal Educational Opportunity Act of 1974 that "the neighborhood is the appropriate basis for determining public school assignments." The consequences of the Fifth Circuit's decision, if allowed to stand by this Court, are likely to be extremely harmful to the goal of quality integrated education in Austin, Texas. We submit, therefore, that grant of this petition to review the decision of the Fifth Circuit is strongly supported by every relevant consideration set out by this Court in Rule 19.

There can be no doubt as to the basis on which the Fifth Circuit reversed the District Court's holding that Mexican-American students had not been unconstitutionally segregated by the School District. Without showing or expressly holding that the District Court's factual findings on this issue are clearly erroneous, the Fifth Circuit adopted a legal standard for finding unconstitutional segregation that effectively made those findings irrelevant and made the mere fact of ethnic imbalance itself unconstitutional. The Fifth Circuit found a *prima facie* case of unconstitutional segregation of Mexican-Americans by the School District as follows:

> It has been the AISD's policy to assign students to the schools closest to their homes. The City of Austin, with the exception of the strip between East and West Austin, has ethnically segregated housing patterns. Hence, the natural, foreseeable, and inevitable result of the AISD's student assignment policy has been segregated schools throughout most of the City. Moreover, as we found in *Austin I*, '[a]ffirmative action to the contrary would have resulted in desegregation . . .' The inference is inescapable: The AISD has intended, by its continued use of the neighborhood assignment policy, to maintain segregated schools in East and West Austin. [citation and footnotes omitted]

App. 16.

The Fifth Circuit's holding that the School District failed to rebut the *prima facie* case is contained in the following quotation:

> At least in the Texas schools, where we have held that Mexican-American students are entitled to the same benefits of *Brown* as are blacks, school authorities may not constitutionally use a neighborhood assignment policy creating segregated schools in a district with ethnically segregated residential patterns. A segregated school system is the foreseeable and inevitable result of such an assignment policy. When this policy is used, we may infer that the school authorities have acted with segregative intent.

App. 20.

Although this rule is phrased in terms of "Texas schools" and "Mexican-American students," it is clearly applicable to any racial or ethnic minority in any state. Once the rhetoric of "inferred intent" and "natural and foreseeable consequences" is pierced, it is obvious that a *per se* rule of unconstitutionality has been created. In this country, the universally accepted basis of assignment to schools has been the neighborhood. Hence, regardless of actual purpose or intent, a *prima facie* case of *de jure*

segregation may be made out under the Fifth Circuit's holding when neighborhood schools are used in school districts with racial or ethnic concentrations.

The Fifth Circuit has in effect adopted the legal standard for finding unconstitutional segregation that was proposed by a minority of six judges, in an opinion also by Judge Wisdom, in *Austin I*. In his *Austin I* opinion Judge Wisdom expressly adopted the view that "It is not necessary to prove discriminatory motive, purpose or intent as a prerequisite to establishing an equal protection violation where discriminatory effect is present." 467. F.2d at 864-65 n. 25.[2] The effect of this approach would be, of course, to eliminate the distinction between constitutionally prohibited *de jure* segregation and statistical racial imbalance and to find in all racial imbalance a constitutional violation requiring remedy.[3]

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[2]*See also*, Judge Wisdom's statement in his *Austin I* opinion that:

> The statistics in this case, as in almost all school cases, prove a pattern of discrimination. The statistics supplemented by maps in evidence graphically show a heavy concentration of students of one race in a school in an area where there is a heavy concentration of residents of that race.

467 F.2d at 873. But, see, to the contrary, Mr. Justice White's statement for this Court in *Washington v. Davis*, __ U.S. __, 96 S.Ct. 2040, 2048 (1976) that this Court has "rejected allegations of racial discrimination based solely on the statistically disproportionate racial impact" of racially neutral legal requirements.

[3]It was on the basis of this legal standard that Judge Wisdom would have reversed the District Court and found unconstitutional segregation of Mexican-Americans in *Austin I*. Contrary to statements in the present opinion of the Fifth Circuit, however, this legal standard was adopted by only a minority of the judges of the Fifth Circuit who participated in *Austin I*. Under the majority opinion, as Judge Wisdom protested in his dissenting opinion, "The validity of the *de facto-de jure* dichotomy remains unanswered." 467 F.2d at 887.

The present opinion of the Fifth Circuit purports to recognize that the legal standard for finding unconstitutional segregation adopted in Judge Wisdom's opinion in *Austin I* (incorrectly identified as the opinion of the Court) is invalid: "To the extent that . . . *Austin I* applied cause-and-effect tests and rejected the requirement of a showing of discriminatory intent, [it was] supervened by *Keyes*." App. 10. As the reasoning of the Fifth Circuit quoted above shows, however, in effect the very same invalid standard was adopted and applied in the present opinion. What the Fifth Circuit has done is to acknowledge on the one hand that this Court in *Keyes* "supervened," or more accurately overruled, the Fifth Circuit's holding in prior cases that *de facto* segregation is unconstitutional and then, on the other hand, to reinstitute the unconstitutionality of *de facto* segregation by establishing a rule that makes racial or ethnic imbalance in schools unconstitutional.

That the Fifth Circuit has rejected the relevance of a showing of discriminatory intent to a finding of *de jure* segregation is apparent throughout its opinion. The opinion states, for example, that unlawful state-imposed segregation may be established by showing that "affirmative action by school authorities could have resulted in desegregation." App. 13. Similarly, the opinion denounces as a "basic misconception" the School District's argument that it has no constitutional duty to eliminate school ethnic concentration resulting from residential ethnic concentration and not from ethnic discrimination. Of course, school ethnic concentration or imbalance can always and everywhere be eliminated by abandoning neighborhood assignment and adopting ethnic assignment and the trans-

portation of children out of their neighborhoods. The assignment pattern is always controlled by the School District. The adoption and continued use of neighborhood assignment provides no basis for finding or inferring discriminatory intent on the basis of foreseeable consequences, however, because its use is explained and justified by compelling reasons that have nothing to do with discrimination. The logic that might underlie the foreseeable consequences test in other areas breaks down when applied to the use of a neighborhood school assignment policy because several results are natural and foreseeable. Recognizing that in metropolitan areas usually there are ethnically and racially concentrated housing patterns, one foreseeable consequence of the neighborhood school student assignment policy is ethnically concentrated schools. Other equally foreseeable consequences of the neighborhood school are "minimization of safety hazards to children in reaching school, economy of cost in reducing transportation needs, ease of pupil placement and administration through the use of neutral, easily identifiable standards, and better home-school communication." *Keyes*, 413 U.S. at 245-246 (concurring opinion Mr. Justice Powell). In addition, Justice Powell points out that the basic reason for neighborhood schools is the "deeply-felt desire of students for a sense of community in their public education . . . [C]ommunity support, interest, and dedication to public schools may well run higher with the neighborhood attendance pattern: distance may encourage disinterest." *Id*. Consequently, more than one logical inference is possible when a school board continues to use a neighborhood policy. To find *de jure* segregation on the basis of a school district's continued use of neighborhood assignment is, therefore, not to find but to obviate the need for finding discriminatory intent and to make neighborhood assignment unconstitutional almost everywhere despite the fact that its use provides no basis for inferring discriminatory intent.

The Fifth Circuit can derive no support for its decision by its references to the *en banc* decisions of the Court in *Austin I*. These references on this issue are all to Judge Wisdom's minority opinion which was based, as the Fifth Circuit now purports to recognize, on an erroneous legal standard. For example, in *Austin I* Judge Wisdom, referring to the schools that served the special needs of some Mexican-American children (the non-English speaking children of migrant workers), stated:

> We admire the AISD for its unquestionably sincere efforts in this area. Yet, we are not convinced that, to meet the special educational needs of Mexican-American children, the AISD had to keep these children in separate schools, isolate them in Mexican-American neighborhoods, or prevent them from sharing in the educational, social, and psychological benefits of an integrated education. [citation omitted] A benign motive will not excuse the discriminatory effects of the School Board's actions.

467 F.2d at 871. In his present opinion for the Fifth Circuit, he quotes only the second sentence of this statement, omitting the first and the third, and then states, "We concluded [in *Austin I*] that the AISD intentionally acted to segregate Mexican-Americans in the pre-*Brown* years." In fact, however, this was not the conclusion of the Court but of only a minority of the participating judges, and that conclusion, as the omitted sentences make clear, was not that the School District intentionally discriminated against

Mexican-Americans but that motive or intent was irrelevant. In any event, the decision in *Austin I* clearly was not and could not be addressed to the proceedings here involved. The decision in *Austin I* was to remand the case to the District Judge for further hearings and consideration specifically instructing him that his power to order a remedy "will depend first upon a finding of the proscribed discrimination in the school system." (467 F.2d at 884). The District Judge then held twelve days of additional hearings and again found no *de jure* segregation of Mexican-Americans. The Fifth Circuit in *Austin I* clearly could not have rejected as "clearly erroneous" findings that had not yet been made. The present opinion, as already noted, in fact holds those findings not clearly erroneous but irrelevant.

The Fifth Circuit's holdings that ethnically neutral neighborhood assignment may not constitutionally be used in areas of ethnic residential concentration—that the resulting ethnically imbalanced schools are *de jure* segregated regardless of the absence of discriminatory purpose or intent—is plainly inconsistent with this Court's school desegregation decisions and reflects a total misunderstanding of the basis of those decisions.

Brown v. Board of Education, 347 U.S. 483 (1954), held that state-compelled school segregation is unconstitutional. In *Green v. County School Board,* 391 U.S. 430, 437-438 (1968) school boards were charged with the duty to eliminate racial discrimination and all its effects from school systems; to see, as this Court stated, "that state-imposed segregation has been completely removed." *Id.* at 439. The duty is not, as the Fifth Circuit apparently believed, to remove, remedy, or prevent racial imbalance in schools not caused by racial discrimination. Three years

after *Green,* this Court reiterated, in *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15 (1971) that "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation." School authorities, the Court said, could decide that "each school should have a prescribed ratio of negro to white students reflecting the proportion for the district as a whole," but "absent a finding of a constitutional violation, . . . that would not be within the authority of a federal court. As with any equity case, the nature of the violation determines the scope of the remedy." *Id.* at 16. This Court further stated that if the holding of the District Court were read "to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse." *Id.* at 24.

In *Keyes,* 413 U.S. at 208, on which the Fifth Circuit purported to rely, this Court "emphasize[d] that the differentiating factor between *de jure* segregation," which requires and justifies a remedy, "and so-called *de facto* segregation," which does not, "is *purpose* or *intent* to segregate." In *Wright v. Council of City of Emporia,* 407 U.S. 451, 473 (1972), Chief Justice Burger stated for himself and three other members of the Court in a dissenting opinion (but with no member of the Court expressing disagreement on this point), "It can no more be said that racial balance is the norm to be sought, than it can be said that mere racial imbalance was the condition requiring a judicial remedy."

This Court's decision in *Milliken v. Bradley,* 418 U.S. 717 (1974), unfortunately ignored by the Fifth Circuit except for citation in a footnote, is squarely in point. In that case this Court held that the existence of predominately

black schools in one school district and predominately white schools in adjacent districts did not, absent a showing that the imbalance was caused by racial discrimination, create an obligation to remove the imbalance. Racially neutral geographic assignment, the decision makes clear, is not constitutionally prohibited merely because racially imbalanced schools result. The desegregation remedy, the Court pointed out, "is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position that they would have occupied in the absence of such conduct." *Id.* at 746. Where, as in the present case in regard to Mexican-Americans, no discriminatory conduct has been found, there is no basis for requiring a remedy.

Two decisions of this Court rendered after the decision of the Fifth Circuit below further demonstrate the fundamental error of that Court's approach. *Washington v. Davis*, __US.__, 96 S.Ct. 2040 (1976), involved a challenge to the use of a qualifying test for applicants for police officer positions in the District of Columbia. Plaintiffs claimed that the test should be held racially discriminatory because it operated to exclude a greater proportion of blacks than whites. Upholding the use of the test despite this undeniable effect, Justice White stated for the Court, "But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." *Id.* at 2047. Regarding the standard in school cases, the opinion in *Washington* concluded:

> The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominately black and predominately white schools in a community is not alone violation of the Equal Protection Clause.

Id. at 2048.

Finally, there is this Court's most recent decision in a school desegregation case. *Pasadena City Board of Education v. Spangler*, 44 U.S.L.W. 5114 (June 28, 1976). Pasadena had been found to have once had an unconstitutionally segregated school system. The segregation had been remedied by implementation of a court-ordered assignment plan which made all the schools in the system majority white. Although the school board did not thereafter change its method of pupil assignment, majority black schools again appeared as the result of population movements. Reversing the lower court, this Court held that the mere existence of racially imbalanced schools, resulting from residential racial concentration, did not establish a constitutional violation and did not require or justify continued steps by the District Court to remove the racial imbalance.

The conflict between the Fifth Circuit's "foreseeable consequences" test and this Court's standard is best illustrated by applying the syllogistic formulation used by the lower court in determining the presence of "inferred intent" to discriminate to the facts in *Washington*. The constitutional violation found here was based on this syllogism: (1) it has been the School District's policy to assign students to the school closest to their homes; (2) the City of Austin generally has ethnically segregated housing patterns; (3) the "natural, foreseeable and inevitable result" has been segregated schools; (4) the School District could have desegrated by abandonment of its policy of assignment of children to the schools nearest to their homes; (5) the School District nevertheless continued to assign children to the school nearest their homes; (6) hence, the inference is inescapable, the reason [purpose or

motive] the School District chose to assign children to the schools nearest their homes was to segregate Mexican-American children. App. 16. The same syllogistic approach applied to *Washington* would result as follows: (1) it has been the police department's policy to give a qualifying test to job applicants; (2) blacks have generally faired worse on that test than whites; (3) the natural and foreseeable result of continued employment of the test has been disqualification of more blacks than whites; (4) the department could have abandoned the test; (5) the department nevertheless continued to use the test; (6) hence, the inference is inescapable, the reason [purpose or motive] the department chose to continue to use the test was to discriminate against blacks. This Court rejected such reasoning in *Washington* because it renders meaningless the constitutional standard requiring a finding of "purpose or intent" to discriminate.

Additional support for the neighborhood assignment policy is found in the Congressional determination embodied in the Equal Educational Opportunity Act of 1974. There Congress found that the neighborhood is the appropriate basis for determining public school assignments, as a matter of national policy. 20 U.S.C. §1701. It further found that the occurrence of racially imbalanced schools caused by population shifts is not an equal protection violation, 20 U.S.C. §1707, and that assignment on a neighborhood basis is not a denial of equal protection of the laws. 20 U.S.C. §1705. The holding of the Fifth Circuit would nullify this Congressional declaration of national policy and render compliance with it a violation of the Fourteenth Amendment.

The substantial conflict among the circuits on the meaning of the "purpose or intent to segregate" standard of *Keyes*, presents another reason to grant the writ. In *Hart v. Community School Board of Education*, 512 F.2d 37

(2nd Cir. 1975), the District Court had found that school authorities had not acted with segregative design or intent. The Second Circuit believed that this Court in *Keyes* had not "settled authoritatively" the question of whether a *de jure* segregation could be based upon foreseeable consequences or whether a finding of racial motivation was necessary. Relying on *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972), the Court held that a finding of racial motivation was not necessary and consequently deemed irrelevant the District Court's finding. The Sixth Circuit similarly held in *Berry v. School District of the City of Benton Harbor*, 505 F.2d 238, 243 (6th Cir. 1974), that "it is not necessary to prove discriminatory motives, purpose or intent as a prerequisite to establishing an equal protection violation when discriminatory effect has been demonstrated," also citing *Wright*. Similarly, in *Oliver v. Michigan State Board of Education*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) and in *United States v. Omaha*, 521 U.S. F.2ds 530 (8th Cir.), *cert. denied*, __ U.S. __, 96 S.Ct. 361 (1975), the Sixth and Eighth Circuits respectively made similar holdings.

Three decisions of the Ninth Circuit and a decision by another panel of the Sixth Circuit conflict with the above cases. The Ninth Circuit reads *Keyes* to require, as a prerequisite to a determination of constitutional violation, a finding that school authorities have intentionally discriminated against minority students by practicing a deliberate policy of racial segregation. *Soria v. Oxnard School District*, 488 F.2d 579 (9th Cir. 1973), *cert. denied*, 415 U.S. 951 (1974); *Johnson v. San Francisco Unified School District*, 500 F.2d 349 (9th Cir. 1974); *Berkelman v. San Francisco Unified School District*, 501 F.2d 1264 (9th Cir. 1974). In *Soria* and *Johnson*, the District Courts had de-

termined that motivation was irrelevant; the Ninth Circuit declared this to be erroneous and held that discriminatory motivation was the critical inquiry. In *Higgins v. City of Grand Rapids*, 508 F.2d 779 (6th Cir. 1974), another panel of the Sixth Circuit held that when no racially discriminatory motivation is shown, statistical imbalance alone does not establish a constitutional violation; there must be a finding of purposeful segregation of students.

The conflict among the circuits on this important question is clear. Significantly, this Court in *Washington*, expressly disapproved the dicta in *Wright* and *Palmer v. Thompson*, 403 U.S. 217 (1971), which had indicated that it was the operative effect of a law and not legislative purpose or motivation that was the paramount factor in determining equal protection issues. As pointed out above, each of the other Circuit Court decisions relied upon by the Fifth Circuit in disregarding inquiry into racially discriminatory motivation, in turn, relied upon *Wright* and *Palmer*.

This Court's opinion in *Washington* removes any doubt that the Fifth Circuit has departed from the standard established by this Court for determining unconstitutional discrimination. Although the Fifth Circuit's test may have some simplistic appeal, it is clear that the Fifth Circuit's test does away with the need for proof of discriminatory purpose and substitutes a test that is based solely upon racially or ethically disproportionate impact. This "effect", standing alone, cannot support a holding of constitutional violation. This Court should correct the legal standard used by the Fifth Circuit and repudiate the *per se* rule holding neighborhood schools unconstitutional in districts having ethnic or racial concentrations.

II.

THE PRACTICAL LIMITATIONS ON DESEGREGATION REMEDIES

Beginning with *Brown II*, this Court has recognized that the district courts, located close to and familiar with the local conditions and practicalities in a school district, should have broad and practical flexibility in performing the judicial appraisal necessary to shape a desegregation remedy. This Court has spoken extensively concerning the shaping of a remedy in both *Swann* and *Davis v. Board of Commissioners of Mobile County*, 402 U.S. 33 (1971), recognizing that "the constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school district as a whole." (*Swann* at 24), and that "having once found a violation, the District Judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." (*Davis* at 37.) Therefore, while the overriding judicial goal is development of a decree "that promises realistically to work and promises realistically to work *now*," (*Green* at 430), the practicalities of the situation and a balancing of interests provide limits to remedial plans.

The majority in *Austin I* referred to these principles in attempting to guide the District Court in shaping a remedy on remand. The District Judge was particularly cautioned that "the length and time of travel for students under any plan must be considered in the light of the age of the children, and the risk to health and probable impingement on the educational process." 467 F.2d at 885.

With these guidelines in mind, the District Court conducted an extensive hearing for the purpose of determining the greatest degree of desegregation possible, taking into account the practicalities of the situation.

Because it found no discrimination against Mexican-American students, the District Court was presented with a situation where the junior and senior high schools were fully desegregated. Additional elementary school integration could be accomplished by removing the sixth grade from elementary schools under a sixth grade center concept whereby six separate schools and two junior high schools located throughout the District would be used for sixth graders. The time and distance involved in transportation to the sixth grade centers was found to be feasible and practical considering the age of the students, and this plan was adopted. Futher integration of elementary schools presented an insurmountable problem, however. There are naturally desegregated elementary schools throughout substantially all the center of Austin. The eight (out of 59) elementary schools with predominately black student populations are located in the eastern portion of the District. Further desegregation of the East Austin elementary schools by use of the close-by Northeast Austin schools was found to be impractical because this would "upset the natural patterns of integration [in Northeast Austin] and would very likely result ultimately in total resegregation." App. 52. Use of the Southeast Austin schools with substantial concentrations of Mexican-American students was found to "be intolerable" because this would force the Mexican-American students to carry a disproportionate share of the burden of desegregation. Use of schools in West and Northwest Austin

was found to require extensive travel time because of the distances involved and because of the fact that buses would have to cross Interstate 35 and skirt or penetrate the downtown area, the State Capitol complex, and the university complex, an area without adequate crosstown access.

Therefore, acting pursuant to the majority opinion in *Austin I* and the directives of this Court, the District Judge examined the practicalities of the situation and found that further desegregation of the eight black elementary schools, "would involve progressively massive transportation, the uprooting of children in the earliest formative years, and would be educationally dysfunctional." Following the Fifth Circuit's direction to consider "age of the children, risk to health and probable impingement on the educational process," he concluded that "the time required for transportation, risk to health and probable impingement of education for students younger than sixth grade would be prohibitive under any such plan." App. 53.

Considering these practicalities, the District Court adopted the School District's proposed desegregation plan and also imposed other extensive requirements on the School District in connection with the plan: a commitment to employ black and Mexican-American assistant superintendents, establishment of majority-to-minority transfer provisions with free transportation, employment of elementary assistant directors to assist in desegregation and education programs directed toward the elementary level, implementation of innovative programs designed to aid minority students including bilingual-bicultural education programs, alteration of existing school attendance zones and the drawing of attendance zones for new

schools to promote desegregation, and construction of new schools in such a manner as to maximize integration. At the time of the 1973 hearing on remand, the School District had, and for years had had, fully desegregated faculty, staff, support personnel, transportation, extracurricular activities and facilities. In addition, the School District had furthered integration by such actions as the gerrymandering of school attendance zones, extending those zones as far as feasibility limits of transportation of students would permit, planning and constructing new schools to draw from naturally integrated neighborhoods where possible, and the closing and combining of schools. The findings of the District Court in regard to the remedy were based in part on the extensive uncontradicted evidence presented by the School District concerning the problems that would be involved in the massive transportation necessary to create greater integration of the eight predominantly black elementary schools. In addition, evidence on the same points was considered from the original 1971 hearing. The record, therefore, abundantly supports the holding of the District Court.

Ignoring this obviously detailed balancing of interests by a District Judge who had been immersed in the facts of this case since 1970 and who had a thorough knowledge of the School District, the Fifth Circuit—omitting any mention of the extensive secondary school desegregation —labeled the plan adopted by the District Court as a plan establishing "a unitary grade" rather than a unitary system. The Fifth Circuit decided that something similar to the approach presented by the Intervenors, the only other effort made to present a plan of any type, should have been imposed. The concept (even the author admits that it is a concept and not a plan) was submitted by Dr.

John Finger and was developed in a period of less than four days. The Intervenors' expert, sitting in New York, apparently without having been to Austin, took a map of the Austin school system and statistical information concerning the enrollment and racial percentages of pupils and developed a concept for achieving greater integration. The concept called for a radical alteration of the entire educational structure, transfer of school assignments for most students, and massive busing of a substantial portion of Austin students, including the transportation of all kindergarten through fourth grade minority students living on the east side of the School District across town to the west side of the District. The problems of transportation, age, health, and educational process were dealt with by simply ignoring them. This approach is a good example of the fact that anyone can develop a theoretical concept for desegregating a school system so long as he does not concern himself with the practical factors with which a school district must deal. Indeed, since 1970, the School District, the Justice Department, the Department of Health, Education and Welfare, the Intervenors, and various groups of parents, citizens, and other interested parties have been attempting to develop a plan which would provide additional desegregation for the Austin school system. The problem is that when the time comes to develop a workable plan, only the School District has been able to develop a plan that is workable and practicable.

In contrast to Dr. Finger, the District Court weighed the many factors bearing on the balancing process and adopted a plan achieving the greatest possible degree of actual desegregation the circumstances would permit. Taking in-

to account the many educational, safety, and familial interests, the District Court held that further integration of elementary children in grades kindergarten through five was impossible without serious risks to education and health. The record before the Court clearly suports this holding. What the Fifth Circuit characterizes as a "vague, conclusory and unsupported assertion" is supported by in excess of 100 pages of transcript in the 1973 record and extensive evidence in the 1971 hearings.

The conflict between the Fifth Circuit's holding and the directives established by this Court is evident. The Fifth Circuit in effect views the federal courts' remedial powers as having no limits. No circumstances can justify anything short of full racial and ethnic mixing. This Court, to the contrary, recognizes that there must be limits. The Fifth Circuit's position is that it is enough to minimize these problems and no limitation is appropriate:

> We therefore direct the District Court, in completing the desegregation plan for Austin, to *minimize* the economic cost of busing, the traffic congestion that the busing plan will cause, the time that school children must spend on the buses, and the number of students who will leave the public school system rather than participate in the desegregation plan. [emphasis added]

App. 34.

Obviously these problems would be minimized in devising any plan, desegregation or otherwise. However, there is a difference between "limit" and "minimize." To say, as the Fifth Circuit is apparently saying, that in accomplishing the objective of desegregation, education, health and safety aspects may be ignored in the end, is to set a standard that will lead to the disintegration of the educational system for both majority and minority students. Recent history of school districts undergoing desegregation accomplished by massive transportation plans makes this clear. Almost universally, the parents who are financially able either move from the district or place their children in private schools to avoid the substantial transportation involved. This causes, as it did for example in Atlanta, districts and individual schools to lose students and become increasingly minority. *See, Calhoun v. Cook*, 522 F.2d 717 (5th Cir. 1975).

The issue here is not the rhetoric of "forced busing." Nor is the issue the refusal of the majority to recognize the rights of the minority. The issue is simply will a desegregation plan work—will the plan provide education to all students so that the past vestiges of discrimination will be truly remedied. The assignment and transportation of students to schools far removed from their neighborhood is a harsh remedy created to overcome vestiges of past discrimination. Therefore, the effectiveness of the remedy must be carefully weighed to determine whether the remedy will actually provide the overall educational result desired. If the remedy causes such a burden on the educational process that students, who can do so, leave the public school system, the remedy is obviously a failure. If, considering the age of the children and risks to health, the remedy actually interferes with the educational process of all children, the remedy is a failure. The inevitable result has been and will continue to be resegregation. No real remedy is provided by measures which disregard the educational function.

The Fifth Circuit's decision also conflicts with this Court's decision in *Pasadena*. A portion of the Finger plan, seemingly approved by the Fifth Circuit, provided

that "when changing demographic patterns cause any of the schools [schools that are naturally desegregated at the time of the hearing or implementation of the plan] to fall outside of the 'naturally desegregated' range, the schools would be brought within the Finger Plan [revised grade combination] system." It is readily apparent that this Court in *Pasadena* disapproved of such a provision, as it had previously in *Swann*. As this Court said in "[h]aving done that [established a racially neutral system of student assignment] we think that in enforcing its order so as to require annual readjustment of attendance zones so that there would not be a majority of any minority in any Pasadena public school, the District Court exceeded its authority." 44 U.S.L.W. 5117 (June 28, 1976). Moreover, this Court reaffirmed its directives in *Swann* concerning limits by stating that in "*Swann*, the Court cautioned that 'it must be recognized that there are limits' beyond which a court may not go in seeking to dismantle a dual school system." 44 U.S.L.W. 5117 (June 28, 1976).

The Fifth Circuit's opinion also conflicts with the Congressional expression of national policy established in the Equal Educational Opportunity Act of 1974, 20 U.S.C. §1701 *et seq*. In §1701, Congress declared it to be the policy of the United States that the neighborhood is the appropriate basis for determining school assignments. In §1702, Congress made a determination that "transportation of students which create serious risks to their health and safety, disrupts the educational process carried out with respect to said students, and impinges significantly on their educational opportunity, is excessive; [and] the risks and harms created by excessive transportation are particularly great for children enrolled

in the first six grades." 20 U.S.C. §1702(a)(4) and (5). Thus, Congress, in 1974, made a specific finding concerning the national policy of the United States which precisely coincided with the evidence presented to and the finding of the District Court. The Fifth Circuit dismissed the finding and evidence as a "vague, conclusory and unsupported assertion . . . ." App. 24. Such a clear statement of national policy must be taken into account by appellate courts when considering what is basically a fact question: whether the District Judge or school authorities has made every effort to achieve the greatest possible degree of actual desegregation. Surely, the Congressional finding, particularly as to the risks and harms created by transportation of children in the first six grades, cannot be simply ignored as the Fifth Circuit has done. Apparently, it has no more regard for Congressional determinations than it has for those made by this Court.

CONCLUSION

This case presents both the issue of the constitutionality of neighborhood schools and the issue of permissible scope of the remedy with unusual clarity. Both of these issues are of national importance and should be settled by this Court.

PRAYER

Petitioner prays that a Writ of Certiorari be granted to review the Judgment and Opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

William H. Bingham
Shannon H. Ratliff
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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I, William H. Bingham, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Petition for Certiorari on Counsel for Respondents by despositing same in the United States Mail on August _____, 1976, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530, Joe Rich, Department of Justice, Civil Rights Division 550 11th Street, N.W., Washington D.C. 20530, Sam Bisco, 1704 Manor Road, Austin, Texas, Gabriel Gutierrez, 1010 E. 7th Street, Austin, Texas 78701.

William H. Bingham

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1976
NO. 76-200

TEXAS EDUCATION AGENCY
(Austin Independent School District), et al,
Petitioner

V.

UNITED STATES OF AMERICA, et al,
Respondents
MEXICAN-AMERICAN LEGAL DEFENSE &
EDUCATION FUND, et al,
Intervenors-Respondents
DEDRA ESTELL OVERTON, NATIONAL
ASSOCIATION FOR THE ADVANCEMENT OF
COLORED PEOPLE, et al,
Intervenors-Respondents

APPENDIX TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Shannon H. Ratliff
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UNITED STATES of America,
Plaintiff-Appellant,

Dedra Estell Overton et al.,
Intervenors-Appellants,

v.

TEXAS EDUCATION AGENCY et al.,
(Austin Independent School District),
Defendants-Appellees.

No. 73-3301.

United States Court of Appeals,
Fifth Circuit

May 13, 1976

WISDOM, Circuit Judge:

The United States and various black and Mexican-American intervenors have challenged the student assignment policies of the Austin Independent School District (AISD). This is the second time this case has come before us. In 1972, our en banc Court remanded the case to the district court with directions to eliminate all discriminatory segregation against black and Mexican-American students and to establish a unitary school system in Austin. *United States v. Texas Education Agency*, 5 Cir., 467 F.2d 848 (*Austin I*). At the time of that decision, the AISD was 65 percent Anglo, 20 percent Mexican-American, and 15 percent black. Eighty-three percent of the black students and 58 percent of the Mexican-

Americans attended schools that contained over three-fifths minority[1] students. The district court, on remand from our en banc decision, adopted the desegregation plan submitted by the AISD. This plan has had two years of operation to prove itself. The school system is now 62 percent Anglo, 23 percent Mexican-American, and 15 percent black. Forty-two percent of the black Austin students and 45 percent of the Mexican-Americans still attend schools that are over three-fifths minority. Progress has been made. But the AISD is far from a unitary system.

This Austin case differs from the one we considered in 1972 in two respects. First, we must weigh the effect of the Supreme Court decision in *Keyes*[2] on the burdens of the plaintiffs and defendants. Second, we must measure the constitutional sufficiency of the new desegregation plans the AISD and the intervenors have submitted.

I. PROCEDURAL HISTORY

This school desegregation case was filed in August 1970 by the United States against the Texas Education Agency and seven school districts, including the AISD. The complaint alleged that (1) historically, the defendants had operated a dual system based on race, and continued to do so, and (2) the defendants discriminatorily assigned Mexican-Americans to schools identifiable as Mexican-American schools or as schools intended for blacks and

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[1]The term "minority" is used to refer collectively to Mexican-American and black students.

[2]*Keyes v. School District No. 1,* Denver, Colorado, 1973, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548.

Mexican-Americans. Certain blacks and Mexican-Americans intervened on their own behalf and as representatives of those similarly situated.

After the parties and the United States Department of Health, Education, and Welfare were unable to agree on a desegregation plan, the district court consolidated a hearing that took place June 14 to June 21, 1971. The court held that there had been no *de jure* discrimination against Mexican-Americans and afforded them no relief. It then held that the "vestiges of a dual system continue to exist with respect to blacks" and adopted, with minor modifications, the AISD plan for establishing a unitary school system in Austin. The high schools and junior high schools were to be desegregated primarily by busing about 2200 blacks to previously predominantly white schools. The elementary schools were "clustered" into groups of six schools each. One week per month the students of each cluster were to meet together to engage in certain planned activities. The district court found "that elementary students would be in a desegregated environment as much as twenty-five (25) percent of the school year".

This Court, sitting en banc, reversed and remanded the case to the district court with directions to eliminate the unconstitutional segregation of Mexican-American and black students "at once". 467 F.2d at 883. We held that the AISD had caused and perpetuated the segregation of blacks within the school system and that it had not dismantled this dual system. The Court further held that the educational status of Mexican-American students was inferior to that of their Anglo counterparts and that Mexican-Americans in Austin were a separate ethnic minority within the ambit of the Equal Protection Clause. Because

school authorities, by their actions, contributed to the segregation of Mexican-Americans in the Austin schools, we held that these students were denied the equal protection of the laws.

The en banc Court divided only on the issue of remedy. A majority of the Court directed the district court to eliminate the dual school system and itemized a hierarchy of desegregation tools that the court should consider using. Six judges dissented: "The majority opinion . . . [is] an example of how a reviewing court can pass the buck, give the school board a delay, and confuse the district court on remand." 467 F.2d at 888. This evaluation has to some extent been borne out by later events. The district judge admitted to the attorneys in this case that he was baffled by the majority opinion on remedy and asked for help in interpreting it. The response of the attorneys (of both the intervening appellants and the AISD) was to move for clarification of this Court's mandate. The motion was denied over the dissent of five judges. *United States v. Texas Education Agency*, 5 Cir. 1973, 470 F.2d 1001 (en banc).

On August 3, 1972, the day after our en banc decision was issued, the district court ordered the parties to hold a pre-trial conference within five days to discuss the possibility of joining in the submission of a single desegregation plan to that court. If no agreement could be reached, the AISD, the United States, and the intervenors were ordered to the district court on that day that it was "unable to submit a desegregation plan at this time" and recommended to the court "that local officials be given the opportunity to formulate and submit a plan to the Court before the Court or other parties consider alternatives or modifications to such a plan". On the same

day, the intervenors and the AISD filed desegregation plans. The Government has yet to file any plan.

The AISD's plan would establish six sixth grade centers that would draw all sixth-graders in the school district. The intervenors' plan would require the busing of all kindergarten (K)-to-fourth-grade students at the predominantly minority schools in East Austin to new grade K-4 schools in West Austin, and the busing of all fifth-to-eighth-grade students at predominantly Anglo schools in West Austin to new grade 5—8 schools in East Austin. The plan would also close the one predominantly minority high school remaining in Austin (Johnston) and bus its students to the remaining high schools. The black intervenors added an objection to the 1971 closing of the black high school (Anderson) and black junior high school (Kealing) in Austin, and requested that the schools be reopened and used in any desegregation plan adopted by the court. The district judge conducted the trial for twelve days in May, 1973. He issued a "Memorandum Opinion and Order" on August 1, 1973.

The district court first held that, because the AISD had, in the past, intentionally segregated black students, it must now dismantle its dual system based on race. Second, the court held that its finding of past intentional segregation of blacks constituted a prima facie case of intentional segregation of Mexican-Americans. It concluded, however, that the AISD had successfully rebutted this prima facie case by demonstrating that its racial policies were unrelated to its treatment of Mexican-Americans and that there was an absence of segregative intent toward Mexican-Americans. The court, relying on *Keyes v. School District No. 1, Denver, Colorado,* 1973, 413

U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548, held that it would therefore be improper to order "all-out desegregation" of Mexican-Americans. The court then rejected the black intervenors' challenge of the closing of Anderson and Kealing schools and adopted, with minor modifications, the AISD's plan for establishing an integrated school system. Because Mexican-American students are an identifiable minority entitled to equal protection of the laws, the court further held that they were entitled to equal educational opportunties, including the setting up of special educational programs, such as bilingual and bicultural education.

The United States and the plaintiff-intervenors have appealed from this Memorandum Opinion and Order of the district court.

II. SEGREGATION OF MEXICAN-AMERICANS

A. The *Keyes* Case

[1-3] The Supreme Court held in *Brown v. Board of Education,* 1954, 347 U.S. 483, 495, 74 S.Ct. 686, 692, 98 L.Ed. 873, 881, that educational facilities segregated on the basis of race are inherently unequal. In *Keyes v. School District No. 1, Denver, Colorado,* 1973, 413 U.S. 189, 195-98, 93 S.Ct. 2686, 2690-2692, 37 L.Ed.2d 548, 555-557, the Court extended this principle to the segregation of Mexican-Americans in the Denver school system. The unequal educational status of these minorities does not constitute a violation of the Equal Protection Clause of the Fourteenth Amendment unless it results from "state action". The term of art that has long described the state action requirement in the school desegregation context is "*de jure* segregation", which the Supreme Court has defined as "a current condition of segregation resulting from intentional state action directed specifically to the [segregated] schools". *Keyes,* 413 U.S. at 205-06, 93 S.Ct. at 2697, 37 L.Ed.2d at 561. *See generally Cisneros v. Corpus Christi Independent School District,* 5 Cir. 1972, 467 F.2d 142, 148 (en banc), *cert. denied,* 1973, 413 U.S. 920, 93 S.Ct. 3053, 37 L.Ed.2d 1041. To establish a prima facie case of unlawful school segregation, the plaintiffs must therefore prove (1) that there is segregation in public schools, (2) that state officials have, with segregative intent, taken or refrained from taking certain actions, and (3) that the present segregated system is a result of that action or inaction.[3]

[3] The eight concurring judges in *Austin I* held:

> The power of the district court will depend first upon a finding of the proscribed discrimination in the school system. . . . In determining the fact of discrimination *vel non* . . . , the district court must identify the school or schools which are segregated as a result of such discrimination . . . The importance of such a determination will be seen in some populous school districts embracing large geographical areas. There may be segregated schools which are the result of unconstitutional statutes or of official action. There may be other one race schools which are the product of neutral, non-discriminatory forces.

467 F.2d at 884. To the extent that this holding requires a court to identify the intentional state action that segregated a school as a prerequisite to including that school in a desegregation plan, the holding was unambiguously supervened by *Keyes*. The Supreme Court there stated:

> We have never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of *de jure* segregation as to each and every school or each and every student within the school system. . . . [W]here plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is on-

The remainder of the *Keyes* opinion considers whether proof of *de jure* segregation in a portion of the Denver school district is sufficient to establish a system-wide constitutional violation. This section of *Keyes* is irrelevant to our disposition of the case before us because we hold below that the plaintiffs have proved that intentional segregation exists throughout the Austin school district.

B. The *Cisneros-Austin I* Test

We found in *Austin I* that Mexican-American students in Austin had received an education inferior to that of their Anglo counterparts and that this was the result of ethnic segregation. 467 F.2d at 862–63 & n.21. This would constitute an equal protection violation, we held, only if the "school authorities, by their actions, [had] contribute[d] to segregation in education, whether by causing additional segregation or maintaining existing segregation . . . ." 467 F.2d at 863–64. Our ultimate decision against the AISD was based in part on our finding that "[t]he natural and foreseeable consequence of [its] actions was segregation of Mexican-Americans". 467 F.2d at 863. We held, however, that, to establish an equal protection violation, it is not necessary to prove discriminatory intent when there is discriminatory effect. 467 F.2d at 864–65 n.25.

Although, in *Cisneros,* we discarded "the anodyne dichotomy of classical de facto and de jure segregation", the rationale of that decision was very similar to that of

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ly common sense to conclude that there exists a predicate for a finding of the existence of a dual school system.

413 U.S. at 200, 201, 93 S.Ct. at 2694, 37 L.Ed.2d at 558.

Austin I. The Court held that, in order to sustain a constitutional violation,

> [we] need only find a real and significant relationship, in terms of cause and effect, between state action and the denial of educational opportunity occasioned by the racial and ethnic separation of public school students.

Id. As in *Austin I,* we held that "[d]iscriminatory motive and purpose . . are not necessary ingredients of constitutional violations in the field of public education". 467 F.2d at 149. And, in language reminiscent of the *Austin I* "foreseeable consequences" approach, the Court found the requisite state action in *Cisneros* in the Board's imposition of "a neighborhood school plan, *ab initio,* upon a clear and established pattern of residential segregation in the face of an obvious and inevitable result". *Id.*

Thus, *Austin I* and *Cisneros* both applied cause-and-effect tests for finding the state action that is a prerequisite to establishing a constitutional violation. But, in both cases, this test was applied in the context of school board actions that led to the "foreseeable" and "inevitable" result of segregated schools.

C. The Impact of *Keyes* on the *Cisneros-Austin I* Test

The Mexican-American intervenors argue that the cause-and-effect test need not fall by the wayside after *Keyes* because that case does not establish that segregative intent is a necessary element of unconstitutional school segregation. The intervenors point out that the *Keyes* holding is limited by the plaintiffs' concession in that case that they had the burden of proving intentional state action and by the obvious segregative purpose of the Denver school authorities. *See generally Hart v. Community*

School Board of Education, New York School District #21, 2 Cir. 1975, 512 F.2d 37, 49; Comment, Public School Segregation and the Contours of Unconstitutionality: The Denver School Board Case, 45 Colo. L.Rev. 457, 475 (1974). This Court has already rejected this argument. In *Morales v. Shannon,* 5 Cir. 1975, 516 F.2d 411, 412-13, *cert. denied,* 1975, —— U.S. ——, 96 S. Ct. 566, 46 L.Ed.2d 408, 44 U.S.L.W. 3358, we held:

> [W]ith respect to the first issue, segregatory intent, we are governed by *Keyes* . . . , which supervened our holding in *Cisneros* . . . , to the extent that *Keyes* requires, as a prerequisite to a decree to desegregate a de facto system, . . . proof of segregatory intent as a part of state action.

Morales also compels rejection of the intervenors' argument that the *Cisneros-Austin I* test for the constitutional violation is the "functional equivalent" of the *Keyes* test. To the extent that *Cisneros* and *Austin I* applied cause-and-effect tests and rejected the requirement of a showing of discriminatory intent, those cases were supervened by *Keyes.*

[4] But the intervenors also argue that, although this Court in *Cisneros* and *Austin I* refused to search for the defendants' express or specific intent, we did not discard intent as an element of the equal protection violation. The intervenors contend that intent could be inferred in those cases from our findings that segregation was the "inevitable result" and the "foreseeable consequence" of the school boards' actions. Whatever may have been the originally intended meaning of the tests we applied in *Cisneros* and *Austin I,* we agree with the intervenors that, after *Keyes,* our two opinions must be viewed as incorporating in school segregation law the ordinary rule of tort law that

a person intends the natural and foreseeable consequences of his actions.[4] This reading of *Cisneros* and *Austin I* is faithful to the *Keyes* requirement of proof of segregative intent. *See* Comment, 45 Colo. L.Rev. at 464 (1974). *But see* Comment, *Keyes v. School District No. 1*: Unlocking the Northern Schoolhouse Doors, 9 Harv.Civ.Rights-Civ.Lib.L.Rev. 124, 149 n.99 (1974).

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[4]Prosser states the tort rule that "[i]ntent . . . extend[s] not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what he does". The Law of Torts § 8, at 31 (4th ed. 1971). The rule has also been applied in many other areas. *See, e.g., NLRB v. Great Dane Trailers,* 1967, 388 U.S. 26, 33, 87 S.Ct. 1792, 1797, 18 L.Ed.2d 1027, 1034 *quoting NLRB v. Erie Resistor Corp.,* 1963, 373 U.S. 221, 227, 228, 231, 83 S.Ct. 1139, 1144, 1145, 1147, 10 L.Ed.2d 308, 313, 314, 316 (discrimination against labor union member in violation of §8(a)(3) of the National Labor Relations Act):

> Some conduct . . . is so 'inherently destructive of employee interests' that it may be deemed proscribed without need for proof of an underlying improper motive. . . . That is, some conduct carries with it 'unavoidable consequences which the employer not only foresaw but which he must have intended' and thus bears 'its own indicia of intent.'

Gomillion v. Lightfoot, 1960, 364 U.S. 339, 341, 347, 81 S.Ct. 125, 127, 130, 5 L.Ed.2d 110, 113, 116 (unconstitutionality of state statute redefining the boundaries of the City of Tuskegee), where, based on its observation that the "inevitable effect" of the redefinition of the City's boundaries was to remove almost all of its black voters, the Court observed that "the legislation is solely *concerned with*" segregating whites and blacks so as to deprive blacks of their vote, and that, *"to that end* [the Legislature] has incidentally changed the city's boundaries". (emphasis added). *Miller v. Milwaukee,* 1927, 272 U.S. 713, 715, 47 S.Ct. 280, 71 L.Ed. 487, 489 (validity of indirect state tax on federally tax-exempt income): "A result intelligently foreseen and offering the most obvious motive for an act that will bring it about, fairly may be taken to have been a purpose of the act."

Apart from the need to conform *Cisneros* and *Austin I* to the supervening *Keyes* case, there are other reasons for attributing responsibility to a state official who should reasonably foresee the segregative effects of his actions. First, it is difficult—and often futile—to obtain direct evidence of the official's intentions. Rather than announce his intention of violating antidiscrimination laws, it is far more likely that the state official "will pursue his discriminatory practices in ways that are devious, by methods subtle and illusive—for we deal with an area in which 'subleties of conduct . . . play no small part'". *Holland v. Edwards*, 1954, 307 N.Y. 38, 45, 119 N.E.2d 581, 584. *See also United States v. O'Brien*, 1968, 391 U.S. 367, 383-85, 88 S.Ct. 1673, 1682-1683, 20 L.Ed.2d 672, 683-684; Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup.Ct. Rev. 95, 124. Hence, courts usually rely on circumstantial evidence to ascertain the decisionmakers' motivations.[5]

[5] Second, in *Monroe v. Pape*, 1961, 365 U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.Ed.2d 492, 505, the Supreme Court rejected the argument that specific intent is a necessary element of the cause of action under 42 U.S.C. §

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[5] *See* Brest, 1971 Sup.Ct.Rev. at 120-21.

> The process does not differ from that of inferring ultimate facts from basic facts in other areas of the law. It is grounded in an experiential, intuitive assessment of the likelihood that the decision was designed to further one or another objective.

Id. at 121. *See also* Developments in the Law—Equal Protection, 82 Harv.L.Rev. 1065, 1077 (1969). Indeed, in *Keyes* the Supreme Court inferred the School Board's segregative intent with respect to one section of Denver (the core city) from evidence of intentional segregation in another area (Park Hill).

1983, the statute under which many school desegregation cases are brought. The Court held that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions". *Id.* We find no inconsistency between the rule applied in *Monroe v. Pape* and that applied in *Keyes*, nor do we find any reason for applying a standard different from *Monroe v. Pape* in school desegregation cases.[6] *See* Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205, 1292 n.258 (1970).

[6] One final word need be added about our *Austin I* formulation. Our holding that there was unlawful state-imposed segregation was based in part on our finding that affirmative action by the school authorities could have resulted in desegregation. 467 F.2d at 863. The AISD criticizes this approach because it would put

> virtually all school districts . . . under massive desegregation orders. Racial and ethnic imbalances occur wherever there are racial or ethnic minorities, and no school district can measure up to a standard which requires that it have taken affirmative action to

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[6] We are not the first circuit to read the "natural and foreseeable consequences" test into the *Keyes* requirement of segregative intent. *See, e.g., Hart v. Community School Board of Education, New York School District #21*, 2 Cir. 1975, 512 F.2d 37, 50-51; *Morgan v. Kerrigan*, 1 Cir. 1974, 509 F.2d 580, *cert. denied*, 1975, 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed.2d 449; *Oliver v. Michigan State Board of Education*, 6 Cir. 1974, 508 F.2d 178, 182, *cert. denied*, 1975, 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed.2d 449. *But see Soria v. Oxnard School Board of Trustees*, 9 Cir. 1973, 488 F.2d 579, 585, *cert. denied*, 1974, 416 U.S. 951, 94 S.Ct. 1961, 40 L.Ed.2d 301. *See generally* Fiss, School Desegregation: The Uncertain Path of the Law, 4 Phil. & Pub. Affairs 3 (1974).

promote the integration of all racial and ethnic minorities throughout its history.

Our holding in *Austin I* placed no such burden on school boards. Our statement about affirmative action immediately followed our finding that the foreseeable consequence of various actions of the AISD was the segregation of Mexican-Americans. Hence, our holding of unlawful segregation was based on the foreseeability and avoidability of that segregation. *See* Fiss, The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation, 38 U.Chi.L.Rev. 697, 706 (1971). Many circuits have taken this approach.[7] In any event, it should be clear after *Keyes* that the refusal of school authorities to take affirmative action that would desegregate the school system may be probative of the segregative intent underlying various actions of those officials.[8]

D. The Prima Facie Case of Unlawful Segregation of Mexican-Americans in Austin

[7] 1. *Segregation in the schools.* The district court found that there was substantial segregation of Mexican-Americans in the Austin school system. That finding is

[7]*See, e.g., Hart,* 512 F.2d at 50; *Morgan,* 509 F.2d at 585-86; *Oliver,* 508 F.2d at 187; *United States v. Board of School Commissioners of Indianapolis, Indiana,* 7 Cir. 1973, 474 F.2d 81, 89 *cert. denied,* 1973, 413 U.S. 920, 93 S.Ct. 3066, 37 L.Ed.2d 1041.

[8]Justice Powell, in a separate opinion, made the following observations about the approach of the *Keyes* majority: The Court "searches for *de jure* action in what the Denver School Board has done or failed to do". *Keyes,* 413 U.S. at 230, 92 S.Ct. at 2708, 37 L.Ed.2d at 575. "Every act of a school board and school administration, and indeed every failure to act where affirmative action is indicated, must now be subject to scrutiny." 413 U.S. at 234, 93 S.Ct. at 2710, 37 L.Ed.2d at 578.

not clearly erroneous. Our Court has held that "[u]nder *Keyes* . . . and *Cisneros* . . . , schools in Texas with a combined predominance of black and Mexican-American students are eligible to be classified as 'segregated schools'."[9] The statistics paint a clear picture of the extensive segregation that still exists in the Austin schools.[10] Of the 41, 174 students attending one of the 70 elementary and junior high schools in Austin, 16 percent (6590) are black, 24 percent (9950) are Mexican-American, and 60 percent (24,634) are Anglo. About 52 percent (3396) of the black pre-high school students and over 54 percent (5380) of the Mexican-American pre-high school students attend one of the 18 schools that is over three-fifths minority. Over 47 percent (11,610) of the Anglo pre-high school students in Austin attend one of the 24 schools that is over four-fifths Anglo.[11] Of the 17,746 public high school students in Austin, 14 percent (2520) are black, 19 percent (3316) are Mexican-American, and 67 percent (11,910) are Anglo. About 17 percent (423) of the black high school students and over 30 percent (1003) of the

[9]*Arvizu v. Waco Independent School District,* 5 Cir. 1974, 495 F.2d 499, 505 N. 10. *See also Keyes,* 413 U.S. at 197, 93 S.Ct. at 2691, 37 L.Ed.2d at 556.

[10]In citing these statistics, we recall the words of *United States v. Jefferson County Bd. of Educ.,* 5 Cir. 1966, 372 F.2d 836, 887, *aff'd en banc,* 1967, 380 F.2d 387, *cert. denied,* 1967, 389 U.S. 840, 88 S.Ct. 67, 19 L.Ed.2d 103:

> A similar inference [of deliberate discrimination against Negroes] may be drawn in school desegregation cases, when the number of Negroes attending school with white children is manifestly out of line with the ratio of Negro school children to white school children in public schools.

[11]Another 18 percent (4358) of the Anglo elementary and junior high school students attend one of the 8 schools that is between 75 and 80 percent Anglo.

Mexican-American students attend Johnston High School, which is 99 percent minority. Over 55 percent (655) of the Anglo high school students in Austin attend one of the 3 schools that is over four-fifths Anglo.

[8] 2. *Segregative actions taken with segregative intent.* It has been the AISD's policy to assign students to the schools closest to their homes. The City of Austin, with the exception of the strip between East and West Austin, has ethnically segregated housing patterns.[12] Hence, the natural, foreseeable, and inevitable result of the AISD's student assignment policy has been segregated schools throughout most of the city. Moreover, as we found in *Austin I,* "[a]ffirmative action to the contrary would have resulted in desegregation". 467 F.2d at 863. The inference is inescapable: the AISD has intended, by its continued use of the neighborhood assignment policy, to maintain segregated schools in East and West Austin.[13]

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[12]East Austin is bordered on the north by East Nineteenth Street and the airport, on the south by the Colorado River, on the west by Interstate Highway 35, and on the east by the AISD boundary line. We found in *Austin I* that 64 percent of the City's Mexican-Americans live in East Austin. A large portion of the remaining Mexican-Americans live in the area between East and West Austin.

[13]The same conclusion is inferable from other evidence as well. We held in *Austin I*

> that the AISD has, in its choice of school site locations, construction and renovation of schools, drawing of attendance zones, student assignment and transfer policies, and faculty and staff assignments, caused and perpetuated the segregation of Mexican-American students within the school system.

467 F.2d at 865–66. We also found that "[t]he natural and foreseeable consequence of these actions was segregation of Mexican-Americans". 467 F.2d at 863. The Supreme Court inferred segregative intent from the same kind of circumstantial evidence in *Keyes.* See 413 U.S.

The plaintiffs have therefore established a prima facie case of *de jure* segregation of Mexican-Americans in all portions of the school district except the residentially integrated central city area.[14]

E. The AISD's Attempted Rebuttal of the Prima Facie Showing of Segregative Intent

The AISD offers numerous arguments to justify the acts that we criticized in *Austin I* as segregating Mexican-American students in the Austin school system. For the second time, we reject these arguments.

The AISD contends that Mexican-Americans were segregated before 1950 not because of their ethnic background but because they had language difficulties or were the children of migrant workers and needed special educational considerations. We answered this argument in *Austin I:*

> We are not convinced that, to meet the special educational needs of Mexican-American children, the

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at 192, 93 S.Ct. at 2689, 37 L.Ed.2d at 553. The inference of segregative intent that the Supreme Court made regarding the Denver school authorities is equally applicable to their counterparts in Austin.

[14]The district court held that the AISD had, in the past, assigned black students for the purpose of promoting segregation. The plaintiffs argue that this finding of *de jure* segregation in a substantial portion of the Austin school district triggers the *Keyes* presumption of unlawful segregation in the remainder of the district. The AISD responds that this *Keyes* presumption is inapplicable to the case before us because "[t]he existence of a statutorily based black-white system has no probative value with respect to concentrations of Mexican-American students when the Mexican-American Students were classified and treated as white under the dual system". *See Higgins v. Bd. of Educ. of Grand Rapids,* 6 Cir. 1974, 508 F.2d 779, 789. We need not resolve this dispute about the *Keyes* presumption because, even without this presumption, we conclude that the AISD has taken actions intentionally calculated to segregate the Mexican-American students throughout the district.

> AISD had to keep these children in separate schools, isolate them in Mexican-American neighborhoods, or prevent them from sharing in the educational, social, and psychological benefits of an integrated education.

467 F.2d at 869. We concluded that the AISD intentionally acted to segregate Mexican-Americans in the pre-*Brown* years.[15]

[9] The AISD then argues that, even if the early special programs are viewed as intentional segregation, no causal relationship exists between them and the present Mexican-American concentrations in the schools. We rejected this argument in *Austin I* when we held that the post-1950 AISD actions perpetuated the pre-1950 segregation.[16] We now reaffirm our previous rejection of this AISD contention.

The AISD's primary argument with regard to its post-1950 actions is that, although the location of new schools and the drawing of attendance zones for those schools had "the inevitable and unavoidable result" of increasing the concentrations of Mexican-Americans in the East Austin schools, this segregation resulted from the preexisting residential patterns and not from segregative motives of the AISD. This Court recently rejected a sim-

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[15]"[T]he AISD used dual-overlapping attendance zones, student assignment policies, and site selection to segregate Mexican-American students in the years prior to 1954.

467 F.2d at 867.

[16]"After the Supreme Court decision in Brown, the AISD nominally undertook to abolish the dual system based on separate schools for blacks and whites. But the board continued to perpetuate segregation of Mexican Americans.

467 F.2d at 867.

ilar argument in *Morales v. Shannon,* 5 Cir. 1975, 516 F.2d 411, 413, *cert. denied,* 1975, ____ U.S. ____, 96 S.Ct. 566, 46 L.Ed.2d 408, 44 U.S.L.W. 3358:

> the imposition of the neighborhood assignment system froze the Mexican-American students into the Robb and Anthon schools. There could have been no other result and this is strong evidence of segregatory intent.

See also United States v. Midland Independent School District, 5 Cir. 1975, 519 F.d 60, *cert. denied,* 1976, ____ U.S. ____, 96 S.Ct. 1106, 47 L.Ed.2d 314. *United States v. Jefferson County Board of Education*, 5 Cir. 1966, 372 F.2d 836, 876, 879-80, *aff'd en banc*, 1967, 380 F.2d 385, *cert. denied*, 1967, 389 U.S. 840, 88 S.Ct. 67, 19 L.Ed.2d 103.

In rejecting for a second time these contentions of the AISD, we reaffirm—hopefully for the last time—the words of *United States v. Midland Independent School District,* 519 F.2d at 64:

> the facts in the Austin and Corpus Christi cases, however, as in this case, show an overriding intent by the school boards in those districts to isolate, to segregate, Mexican-Americans and blacks.

[10-12] Finally, we think it important to draw attention to a basic misconception of the AISD, on which a great deal of its argument relies. This misconception goes to the heart of the responsibilities of school authorities to provide equal educational opportunities for the students in their districts. The AISD has argued that "[u]nder *Keyes,* the school district was prohibited from segregating Mexican-American students, but it was under no duty to take affirmative action to attempt to avoid Mexican-American concentrations in the schools which resulted from residen-

tial concentrations". At least in the Texas schools, where we have held that Mexican-American students are entitled to the same benefits of *Brown* as are blacks, school authorities may not constitutionally use a neighborhood assignment policy creating segregated schools in a district with ethnically segregated residential patterns. A segregated school system is the foreseeable and inevitable result of such an assignment policy. When this policy is used, we may infer that the school authorities have acted with segregative intent.

The segregation is *de jure* and unconstitutional because it is the result of school board action taken with the obvious (though not necessarily predominant) intent to create or maintain segregated schools. School authorities are then "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch". *Green v. County School Board of New Kent County, Virginia,* 1968, 391 U.S. 430, 437-38, 88 S.Ct. 1689, 1694, 20 L.Ed.2d 716, 723. As articulated in *Austin I,* the case before us presents not only the use of a neighborhood assignment policy in a residentially segregated school district, but also the taking of an extensive series of actions dating back to the early twentieth century that had the natural, foreseeable, and avoidable result of creating and maintaining an ethnically segregated school system. The AISD must convert this "still-functioning dual system to a unitary, non-[ethnic] system—lock, stock, and barrel". *United States v. Jefferson County Board of Education,* 372 F.2d at 878.

III. SEGREGATION OF BLACKS

The district court held that "the AISD . . . has engaged in discriminatory assignment of black students to promote segregation" and ordered the AISD to dismantle its dual school system and convert to an integrated, unitary school system. These holdings have not been challenged on appeal. They are affirmed.

IV. THE REMEDY

A. The "Desegregation Plan" Adopted by the District Court

1. *The Plan.* The district court adopted whole the Sixth Grade Center Plan submitted by the AISD. We begin our analysis of this plan by stating what the AISD did not attempt to accomplish through it. The AISD views the junior and senior high schools in Austin as totally desegregated and, therefore, its plan does not further integrate those schools. The AISD, as noted above, does not believe that it has the duty to desegregate the Mexican-Americans and, hence, its plan has only an incidental effect on these students. Finally, the AISD contends that complete desegregation of the elementary schools would require "massive crosstown busing" of 6-10 year olds, which it views as undesirable, and, therefore, its desegregation plan is limited to the sixth grade.

> As the AISD describes it,
> [t]he Sixth Grade Center Plan essentially establishes six elementary schools in different geographic parts of the School District as centers for all sixth-grade students in the School District. Those buildings

> which are not serving as elementary schools and would become the sixth-grade centers would be emptied of all students K through grade 5 so the building would be available for the Sixth Grade Center. Students in those schools would be assigned to the nearest available elementary school.

The plan would also set up sixth grades at two of the junior high schools in Austin. Of the six Sixth Grade Centers, two would have Anglo populations of over 80 percent; the sixth grade populations at the two junior high schools would be about 97 percent minority. The AISD estimates that the plan would require the busing of about 1900 students, and that about 62 percent of those students would be Anglo.

In an effort to provide equal educational opportunities for all of its students, the AISD has also approved the employment of two assistant superintendents, one to be Mexican-American and one to be black; established majority-to-minority transfer provisions for both black and Mexican-American students; begun to develop a bilingual educational program; made several changes in boundary lines assertedly to produce a better racial and ethnic composition in the city schools; and established an advisory committee to investigate and propose programs for minority students that may be used in Austin.

[13* 2. *The Plan's deficiences.* As we did in *Austin I*, we congratulate the AISD for some of the creative educational techniques it has proposed and adopted for equalizing educational opportunities of minority students in Austin. We cannot applaud, however, the channeling of the AISD's creative abilities into new methods of circumventing its "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which

racial [and ethnic] discrimination would be eliminated root and branch". *Green v. County School Board of New Kent County, Virginia*, 1968, 391 U.S. 430, 437-38, 88 S.Ct. 1689, 1694, 20 L.Ed.2d 716, 723. The first elementary school "desegregation plan" that the AISD presented to the district court provided for meetings of students one week per month to participate in certain cultural activities. We reversed the district court's adoption of this plan, holding that "[p]art-time desegregation does not meet constitutional requirements".[11] 467 F.2d at 872. On remand, the district court adopted the AISD's new "desegregation plan", which leaves untouched the students in grades K-5 and 7-12. For reasons similar to those that underlay our rejection of the AISD's plan in *Austin I*, we again hold that the AISD-district court plan is constitutionally deficient. The constitutional duty of the school authorities is to establish a unitary *system*, not a unitary grade.

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[11] In *Tasby v. Estes*, 5 Cir. 1975, 517 F.2d 92, *cert. denied*, 1975, 423 U.S. 939, 96 S.Ct. 299, 46 L.Ed.2d 271, 44 U.S.L.W. 3264, we held another "part-time" desegregation plan constitutionally deficient. The unique feature of the plan submitted there by the Dallas Independent School District (DISD) and adopted by the district court was the requirement that there be a minimum of one hour a day of contact between the races through two-way oral and visual television communication between two or more schools. We held:

> The Supreme Court has made it clear that nothing less than the elimination of predominantly one-race schools is constitutionally required in the disestablishment of a dual school system based upon segregation of the races. For this reason, the district court's elementary school "television plan" must be rejected as a legitimate technique for the conversion of the DISD from a dual to a unitary educational system.

517 F.2d at 103.

[14, 15] The AISD offers two arguments in support of its failure to desegregate grades K to 5. Both are meritless.

First it cites the Supreme Court's holding that

> the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation.

Davis v. Board of School Commissioners of Mobile County, 1971, 402 U.S. 33, 37, 91 S.Ct. 1289, 1292, 28 L.Ed.2d 577, 581. The only "practicality" it specifies is the vague, conclusory, and unsupported assertion that children under 10 years old should not be bused for the purpose of desegregation. But busing, a "normal and accepted tool of educational policy", cannot be rejected without an evidentiary showing that "the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process". *Swann v. Charlotte-Mecklenburg Board of Education*, 1971, 402 U.S. 1, 29, 30–31, 91 S.Ct. 1267, 1283, 28 L.Ed.2d 554, 575.

[16] The AISD's only other defense of the exclusion of kindergarten-to-fifth-grade students from its desegregation plan is that the black intervenors and the United States should be precluded from objecting to the Sixth Grade Center Plan because they submitted no plan of their own. The Mexican-American intervenors, however, did propose a desegregation plan, in which the black intervenors concurred. And, as to the United States, although we are disappointed by their noncompliance with the district judge's request that they submit a plan, we find no basis for denying them the right to criticize the plan submitted by the AISD.

The plan adopted by the district court also fails to comply with the mandate of *Austin I*. The eight concurring judges in that case held that

> [w]here a student assignment plan is found to be unconstitutional, as here, because of the existence of segregation which has been imposed by statute or by official act against blacks and an identifiable ethnic group (here the Mexican-American students), it is the duty of the school officials to forthwith formulate and implement such student assignment plan as will remedy the discrimination which has been found to exist.

467 F.2d at 884. We held in Parts II and III of this opinion that official discrimination against blacks and Mexican-Americans has infected almost the entire Austin school system. The discrimination has prevented most minority students in the district from securing educational opportunities equal to those of their Anglo counterparts. The AISD's submission of a "desegregation plan" that would provide an integrated education for only sixth grade students simply does not fulfill the AISD's duty to remedy that discrimination.

[17, 18] The plan submitted by the AISD would assign students in grades K to 5 to the schools closest to their homes. The district court's adoption of this plan is directly contrary to the holding in *Austin I* that

> [it] is apparent that [assignment on a strict neighborhood basis] will not suffice in the AISD although it may suffice as to some schools. To the extent that it does not suffice, the district court will proceed to employ other methods of desegregation.

The *Austin I* majority also held that if, after trying the pairing or clustering of schools, the realignment of school

assignment zones, and the relocation of portable school rooms, "proscribed segregated schools still exist, the court must consider the pairing or clustering of schools in non-contiguous school zones". 467 F.2d at 885. It was an abuse of discretion for the court to refuse to give serious consideration to the last desegregation method despite the concession of the AISD that

> [c]ountless efforts by school officials, consultants, and visiting team shave found it impossible to produce significant desegregation by boundary line changes, contiguous pairing of schools, magnet schools, or other effective means short of massive crosstown busing incident to non-contiguous pairing of . . . schools . . . .[18]

[19] 3. *The closing of Anderson High School and Kealing Junior High School.* In his first opinion in this case, the district judge ordered the closing of two all-black schools, Anderson and Kealing.[19] The students from those

[18]The federal courts may adopt desegregation remedies requiring busing only as a last resort. *See* 20 U.S.C. §§ 1713, 1755. In the case before us, however, we find that crosstown busing is the only desegregation method that will work. This finding is supported not only by the above-quoted statement of the AISD but also by the residential patterns in Austin. In school districts with segregated neighborhoods, "[d]esegregation plans cannot be limited to the walk-in school". *Swann v. Charlotte-Mecklenburg Bd. of Educ.* 1971, 402 U.S. 1, 30, 91 S.Ct. 1267, 1283, 28 L.Ed.2d 554, 575. Hence the federal statutes do not bar the court-ordered transportation of students in Austin.

[19]At the time Anderson High School was closed, it was 98 percent black and its student body constituted about 44 percent of the black high school population in the Austin school district. Kealing Junior High School was also 98 percent black and its student body constituted 46 percent of the black junior high school students in the district. *See Austin I,* 467 F.2d at 876-77, Appendix A.

schools were to be transferred to other schools in the system. Six judges concluded in *Austin I* that the schools were closed for racial reasons and, hence, the closings were unacceptable. 467 F.2d at 872. The remaining eight judges did not consider this issue. On remand, the district court found that the school closings were based on nonracial considerations. This finding is clearly erroneous. The AISD concedes, as it must, that a primary reason for the school closings was the fear that whites would flee the school system rather than send their children to these East Austin schools. It is hardly a new principle of constitutional law that this fear is an impermissible basis for closing public schools. *See, e.g., United States v. Hendry County School District,* 5 Cir. 1974, 504 F.2d 550, 553.

Kealing Junior High School must therefore be reopened and used as part of the regular public school program of the District. The district court approved the conversion of Anderson High School into Austin Community College, and the conversion has already taken place. Because it has closed Anderson as a high school, the AISD on remand should present a program that will permit the burdens of desegregation to be as fairly distributed as they would have been if Anderson had not been converted into a community college.[20]

B. The Finger Plan

1. *The Plan.* The Mexican-American intervenors submitted a desegregation plan prepared by Dr. John A. Finger, Jr., a professor of education at Rhode Island Col-

[20]For example, through the construction of a new high school in East Austin.

lege.[21] The "Finger Plan" would convert the school system to a 4-4-4 grade structure, that is, elementary schools would contain grades K to 4, middle schools would contain grades 5 to 8, and high schools would continue to operate grades 9 to 12. All students in grades K to 4 in elementary schools that are over 50 percent minority would be bused to elementary schools that are over 90 percent Anglo. Fifth-to-eighth-grade students in schools that are over 90 percent Anglo would be bused to schools that are over 50 percent minority. The practical effect of the Plan is that kindergarten-to-fourth-grade students in East Austin would be bused to West Austin and fifth-to-eighth-grade students in West Austin would be bused to East Austin. Elementary and junior high schools that are between 50 and 90 percent Anglo are defined as "naturally desegregated" and would remain unchanged. When changing demographic patterns cause any of these schools to fall outside of the "naturally desegregated" range, the schools would be brought within the Finger Plan 4-4-4 system. The high schools would be integrated by selecting, for each high school, feeder schools that would maximize the integration of that high school. Dr. Finger estimates that 18,659 (the AISD says 25,000) of Austin's public school students would be bused under his plan.[22]

[21]Dr. Finger is a recognized authority in the area of school desegregation and has designed the plans presently being used in several cities. He prepared, for example, the plan for Charlotte, North Carolina, which was approved by the Supreme Court in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 1971, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554.

[22]The Finger Plan would therefore require the busing of about 32 percent (42 percent according to the AISD's estimate) of the Austin students. This is comparable to the Charlotte-Mecklenburg, North

[20] 2. *The AISD's objections to the Finger Plan.* The AISD's first objection to the Finger Plan is that it is counter-productive in that it requires kindergarten-to-fourth-grade Anglo students attending schools in minority areas to be bused along with minority students to schools in Anglo areas; it also requires fifth-to-eighth-grade minority students going to predominantly Anglo schools to be bused along with their Anglo classmates to minority areas. These results are dictated by the feature of the Finger Plan that requires *all* students in the relevant grades at "sending schools" to be bused to the designated "receiving schools". About 357 Anglos presently attending minority schools and about 168 minority students presently attending Anglo schools will be bused to the new schools.[23] These students represent only about 1 percent of

Carolina school system, which, before the Supreme Court's 1971 desegregation order, planned to bus 27 percent of its students "without regard to desegregation plans", and the Mobile County, Alabama school system, which bused 30 percent of its students before the Supreme Court's 1971 desegregation order. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 1971, 402 U.S. 1, 6, 29 n. 11, 91 S.Ct. 1267, 1271, 28 L.Ed.2d 554, 561; *Davis v. Board of School Commissioners of Mobile County*, 1971, 402 U.S. 33, 34, 91 S.Ct. 1289, 1290, 28 L.Ed.2d 577, 579. Moreover, the Supreme Court noted in *Swann* that about 39 percent of this country's public school children were bused to their schools in 1969–70. 402 U.S. at 29, 91 S.Ct. at 1282, 28 L.Ed.2d at 574.

[23]The AISD has calculated that the correct figures are 535 Anglos and 336 minority students. These numbers are too high because the AISD has assumed that *all* students at elementary and junior high schools over 50 percent minority or 90 percent Anglo would be bused to new elementary or middle schools outside of their neighborhoods. The Finger Plan, however, would bus only kindergarten-to-fourth-grade students from the elementary schools in East Austin and fifth-to-eighth-grade students from the elementary and junior high schools

the pre-high school students in Austin. These percentages are simply not substantial enough to invalidate the entire desegregation plan. If, on remand, the district court concludes that a constitutionally sufficient degree of desegregation can be achieved without busing these 525 students across town, the Finger Plan may be so modified.

The AISD also criticizes the Finger Plan because the newly created elementary and middle schools would be (by the AISD's estimate) about 54 percent minority, although the entire Austin pre-high school system is only about 40 percent minority. This discrepancy is due to the fact that the "naturally desegregated" schools left untouched by the Finger Plan are substantially more than 60 percent Anglo. Thus, Dr. Finger would permit a disproportionately large number of Anglo students to remain at their present schools.

[21] The Supreme Court has held that "[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole". *Swann*, 402 U.S. at 24, 91 .Ct. at 1280, 28 L.Ed.2d at 571. But the Court later held in the same opinion that "[t]he district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation . . . ." 402 U.S. at 26, 91S.Ct. at 1281, 28 L.Ed.2d at 572. Such an effort must be made by the district court on remand.[24]

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in West Austin. Hence, the AISD estimates are about one-third too high for the Anglo students at minority schools in East Austin and about one-half too high for the minority students at Anglo schools in West Austin.

[24]Quotas may be a starting point for the district court, but are not an ironclad requirement. *See Milliken v. Bradley*. 1974, 418 U.S. 717, 740–41, 94 S.Ct. 3112, 3125, 41 L.Ed.2d 1069, 1088–89; *North Carolina Bd. of Educ. v. Swann*, 1971, 402 U.S. 43, 46, 91 S.Ct. 1284, 1286, 28 L.Ed.2d 586, 589.

[22] The AISD also argues that the 4-4-4 school system, though perhaps logical for the purpose of facilitating school desegregation, is basically inconsistent with sound educational principles. This argument is based solely on the testimony of Dr. Jack Davidson, the Superintendent of Schools for the AISD, that placing fifth graders in the same schools (the middle schools) with students four years older "at that period of time—it is the developmental age—produces all kinds of problems". Even if that statement is considered persuasive, these "problems" can be solved when a final plan is constructed on remand. Dr. Finger testified that his plan could, and perhaps should, be modified to a 5-3-4 system. This plan would replace the middle schools with junior high schools housing the sixth, seventh, and eighth grades.

[23] The AISD next brings to our attention several problems that would be created by the Finger Plan busing program. It first argues that the Plan would require the busing of students "in a basic east-west pattern through a traffic system which provides no adequate east-west arteries". Moreover, the AISD continues, the students would have to be bused through the large complex of the downtown business area, the state office buildings, and the University of Texas, and this would produce a highly congested traffic situation. The AISD also cites the eco-

nomic cost of the busing, the difficulty of obtaining sufficient fuel, and the inevitability of "white flight", which would render the Plan ineffective as a desegregation device.[25]

[24] We think it is important to point out first the reason these remedial costs are relevant to judicial decisionmaking in a school desegregation case. We point this out because the AISD seems to be arguing that these costs are relevant to the determination whether there is a constitutional violation, that is, that the court must decide that the harmfulness of the school segregation is sufficient to justify the remedial costs of correcting that segregation. *See generally* Fiss, The Jurisprudence of Busing, 39 Law & Contemp.Prob. 194 (1975). We disagree.

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[25]The AISD contends that whites will flee the Austin public school system to attend private schools and public schools in surrounding school districts. As a result, the AISD concludes that the plan fails to meet the standard of *Davis v. Board of School Commissioners of Mobile County,* 1971, 402 U.S. 33, 37, 91 S.Ct. 1289, 1292, 28 L.Ed.2d 577, 581: "The measure of any desegregation plan is its effectiveness." The district court was presented with two desegregation plans, the AISD Plan, which would desegregate only the sixth grade, and the Finger Plan, which would desegregate the entire school system. It is wholly speculative whether white flight will eventually render the Finger Plan less effective than the AISD Plan in transforming the AISD into a unitary system. It is beyond dispute, however, that the Finger Plan is the more effective desegregation device for the immediate future. For this reason, and others that we have specified in this opinion, it was an abuse of discretion for the district court to adopt the AISD Plan. *See United States v. Bd. of School Commissioners of Indianapolis, Indiana,* 7 Cir. 1974, 503 F.2d 68, 75–76, *cert. denied,* 1973, 413 U.S. 920, 93 S.Ct. 3066, 37 L.Ed.2d 1041.

The Supreme Court stated the controlling principle in *Swann,* 402 U.S. at 15–16, 91 S.Ct. at 1276, 28 L.Ed.2d at 566:

> a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.

In other words, there are two separate phases to a school desegregation case. First, the Court must determine whether there is *de jure* segregation. This decision, in cases such as the one before us, conforms with the standards of *Keyes*. Second, the Court must decide upon a remedy. It is at this point that the balancing of interests becomes relevant.[26] In this phase of the case, the Court must determine

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[26]The Court stated in *Brown II* that, in determining whether school authorities should be given additional time to carry out the desegregation remedy, "the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel . . . ." 349 U.S. 294 at 300, 75 S.Ct. 753, 99 L.Ed. 1083. The *Brown II* Court, however, carefully limited its approval of consideration of these problems to the delay issue. *See also Watson v. Memphis,* 1963, 373 U.S. 526, 532–33, 83 S.Ct. 1314, 1318, 10 L.Ed.2d 529, 534–35.

The AISD's arguments that its school district should not be ordered to desegregate "root and branch" because of economic cost and the specter of white flight have already been rejected by the Supreme Court. In *Watson,* 373 U.S. at 537–38, 83 S.Ct. at 1320–21, 10 L.Ed.2d 537–38, the Court was unpersuaded by the argument that desegregation of the Memphis parks should be delayed because of the expenses it would generate:

the least costly method of correcting the constitutional violation.[27] But the above quote from *Swann* leaves no doubt that, however, the balancing of interests is resolved, the constitutional violation must be corrected.

[25] We therefore direct the district court, in completing the desegregation plan for Austin, to minimize the economic cost of busing, the traffic congestion that the busing plan will cause, the time that school children must spend on the buses, and the number of students who will leave the public school system rather than participate in the desegregation plan.[28] The overriding judicial goal,

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it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny them to afford them. We will not assume that the citizens of Memphis accept the questionable premise implicit in this argument or that either the resources of the city are inadequate, or its government unresponsive, to the needs of all of its citizens.

And the Court has repeatedly held that segregative state action must be terminated and remedied despite public disagreement with the constitutional principles. *See, e. g., United States v. Scotland Neck City Bd. of Educ.*, 1971, 407 U.S. 484, 490–91, 92 S.Ct. 2214, 2217–18, 33 L.Ed.2d 75, 80–81; *Watson*, 373 U.S. at 535, 83 S.Ct. at 1319, 10 L.Ed.2d at 536; *Cooper v. Aaron*, 1958, 358 U.S. 1, 16, 78 S.Ct. 1401, 1408, 3 L.Ed.2d 5, 15: *Brown II*, 349 U.S. at 300, 75 S.Ct. at 756, 99 L.Ed. at 1106; *Buchanan v. Waley*, 1917, 245 U.S. 60, 81, 38 S.Ct. 16, 20, 62 L.Ed. 149, 163.

[27]*See* Fiss, 39 Law & Contemp.Prob. at 198. Professor Fiss correctly points out that "[t]he court need not choose the remedy that has the best cost-benefit relationship since it may eliminate a smaller portion of the harm". Id.

[28]On the issue of "white flight", the district court should accord appropriate weight to the following testimony of Dr. Finger:

> [M]y thought in preparing this plan was to minimize the public anguish over busing as much as possible, that there isn't any way that one can overcome it, but my attempt was to minimize it as much as possible.

however, must be "the development of a decree 'that promises realistically to work, and promises realistically to work now.'". *Davis v. Board of School Commissioners of Mobile County*, 402 U.S. at 38, 91 S.Ct. at 1292, 28 L.Ed.2d at 581, *quoting Green v. County School Board of New Kent County, Virginia*, 1968, 391 U.S. 430, 439, 88 S.Ct. 1689, 1694, 20 L.Ed.2d 716, 724.

C. Formulation of the Desegregation Decree

[26] We affirm the district court order that the AISD continue in its active efforts to recruit Mexican-American teachers. The AISD should work "toward the achievement, as a goal, of a ratio of mexican-american teachers to total faculty that approaches the ratio of mexican-american students to the total student population". *Cisneros*, 467 F.2d at 151-52. Moreover, the ratio of Mexican-American to Anglo teachers in each school should be substantially the same as it is throughout the district. *See United States v. Montgomery County Board of Education*, 1969, 395 U.S. 225, 89 S.Ct. 1670, 23 L.Ed.2d 263. We have already held that the AISD has adequately desegregated its faculty on a black-white basis. *Austin I*, 467 F.2d at 870 n. 37.

[27] The AISD had an ongoing bilingual-bicultural education program that the Superintendent of Schools testified would continue "regardless of the level of federal funding". Indeed, state and federal law require as much. *See* 20 U.S.C. § 1703(f); Tex.Educ.Code Ann. § 21.451 et seq. (1975 pocket part). *See also Lau v. Nichols*, 1974, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1. The district court properly made this commitment a part of its decree.

[28] We held in *United States v. Board of Public Instruction of Polk County, Florida,* 5 Cir. 1968, 395 F.2d 66, 69, that

> [t]here is an affirmative duty, overriding all other considerations with respect to the locating of new schools, except where inconsistent with "proper operation of the school system as a whole" to *seek* means to eradicate the vestiges of the dual system.

See also Swann, 402 U.S. at 20–21, 91 S.Ct. at 1278, 28 L.Ed.2d at 569; *Tasby v. Estes,* 5 Cir. 1975, 517 F.2d 92, 104–06, *cert. denied,* 1975, 423 U.S. 939, 96 S.Ct. 299, 46 L.Ed.2d 271. The district court was therefore correct in incorporating into its order the commitment of the AISD to locate newly constructed schools in such a manner as to maximize integration. When formulating the Austin desegregation decree on remand, the district court should approve new school sites only if they would operate, within the context of the new desegregation decree, to maximize integration in the district.

[29] We suggest that the district court consider appointing a master to draft a comprehensive tri-ethnic desegregation plan consistent with this opinion and the decisions of the United States Supreme Court.[29] The plan should conform to one of the approaches outlined by Dr. Finger in his written submission of August 14, 1972, and in his testimony.

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[29]The AISD should provide staff assistance to the master or expert upon his request. *See, e. g., United States v. Bd. of School Commissioners of Indianapolis, Indiana,* 7 Cir. 1974, 503 F.2d 68, 78, *cert. denied,* 1973, 413 U.S. 920, 93 S.Ct. 3066, 37 L.Ed.2d 1041; *Bradley v. Milliken,* 6 Cir. 1973, 484 F.2d 215, 252, *rev'd on other grounds, 1974, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069.*

V. CONCLUSION

[30] Finally, the intervenors are entitled to reasonable attorneys' fees. *See* § 718 of Title VII of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617; *Bradley v. School Board of Richmond,* 1974, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476; *Henry v. Clarksdale Municipal Separate School District,* 5 Cir. 1973, 480 F.2d at 583. The district court should conduct evidentiary proceedings to determine the proper amount of fees to be awarded.

We have today held, for the second time, that a desegregation plan submitted by the AISD is constitutionally insufficient. Blacks and Mexican-Americans in Austin have waited a long time for the unitary school system that the constitution requires. We suggest that the district court move expeditiously on remand to provide Austin minority students with such a system.

We reverse the judgment of the district court and remand the case for further proceedings consistent with this opinion. The mandate of the Court shall issue forthwith. The district court should consider appointing a master to prepare a comprehensive desegregation plan. The desegregation plan adopted by the district court in 1973 may be continued only as a stop-gap.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX
AUSTIN INDEPENDENT SCHOOL DISTRICT
ETHNIC COMPOSITION OF STUDENTS*
1975-76

School	*Total*	*Black*	*Mexican-American*	*Anglo*
SENIOR HIGH SCHOOLS				
Anderson	2432	219	57	2156
		(9)	(2)	(89)
Austin	1842	210	502	1130
		(12)	(27)	(61)
Crockett	3095	239	299	2557
		(8)	(10)	(82)
L. B. Johnson	1656	388	127	1141
		(23)	(8)	(69)
Johnston	1441	423	1003	15
		(29)	(70)	(1)
Lanier	2285	291	151	1843
		(13)	(6)	(81)
McCallum	1407	94	203	1110
		(7)	(14)	(79)
Reagan	1688	502	171	1015
		(30)	(10)	(60)
Travis	1900	154	803	943
		(8)	(42)	(50)
SENIOR HIGH SCHOOLS TOTALS	17,746	2520	3316	11,910
		(14)	(19)	(67)

Derived from October 10, 1975 submission of the AISD. Figures in parentheses indicate percentages.

School	*Total*	*Black*	*Mexican-American*	*Anglo*
JUNIOR HIGH SCHOOLS				
Allan	836	268	575	20
		(31)	(67)	(2)
Bedichek	1168	75	181	912
		(6)	(16)	(78)
Burnet	1029	139	70	820
		(13)	(7)	(80)
Dobie	1110	206	118	786
		(18)	(11)	(71)
Fulmore	921	83	431	407
		(9)	(47)	(44)
Lamar	750	50	133	567
		(7)	(18)	(75)
Martin	957	74	851	32
		(8)	(89)	(3)
Murchison	873	109	18	746
		(13)	(2)	(85)
O. Henry	694	57	80	557
		(8)	(12)	(80)
Pearce	1308	435	104	769
		(33)	(8)	(59)
Porter	934	105	147	682
		(11)	(16)	(73)
JUNIOR HIGH SCHOOLS TOTALS	10,607	1601	2708	6298
		(15)	(26)	(59)

School	*Total*	*Black*	*Mexican-American*	*Anglo*
ELEMENTARY SCHOOLS				
Allison	714	106	580	28
		(15)	(81)	(4)
Andrews	515	129	36	350
		(25)	(7)	(68)
Baker	489	47	102	340
		(10)	(21)	(69)
Barrington	654	13	80	561
		(2)	(12)	(86)
Barton Hills	317	4	11	302
		(1)	(4)	(95)
Becker	711	68	521	122
		(10)	(73)	(17)
Blackshear	450	436	14	—
		(97)	(3)	
Blanton	616	207	63	346
		(34)	(10)	(56)
Brentwood	547	22	99	426
		(4)	(18)	(78)
Brooke	389	3	377	9
		(1)	(97)	(2)
Brown	548	119	151	278
		(22)	(27)	(51)
Bryker Woods	244	2	20	222
		(1)	(8)	(91)
Campbell	468	460	6	2
		(98)	(1)	(1)
Casis	591	20	32	539
		(3)	(6)	(91)
Cook	668	26	85	557
		(4)	(13)	(83)
Cunningham	806	10	90	706
		(1)	(11)	(88)

School	*Total*	*Black*	*Mexican-American*	*Anglo*
Dawson	693	41	442	210
		(6)	(64)	(30)
Dill	114	3	7	104
		(3)	(6)	(91)
Doss	626	10	7	609
		(2)	(1)	(97)
Govalle	698	167	501	30
		(24)	(72)	(4)
Graham	400	11	29	360
		(3)	(7)	(90)
Gullett	481	—	7	474
			(1)	(99)
Harris	590	120	72	398
		(20)	(12)	(68)
Highland Park	408	4	13	391
		(1)	(3)	(96)
Hill	551	5	6	540
		(1)	(1)	(98)
Joslin	947	94	130	723
		(10)	(14)	(76)
Lee	260	36	47	177
		(14)	(18)	(68)
Linder	624	47	99	478
		(7)	(16)	(77)
Maplewood	353	280	40	33
		(79)	(11)	(10)
Mathews	257	31	69	157
		(12)	(27)	(61)
Menchaca	381	12	42	327
		(3)	(11)	(86)
Metz	495	4	487	4
		(1)	(98)	(1)
Norman	316	309	7	—
		(98)	(2)	

School	*Total*	*Black*	*Mexican-American*	*Anglo*
Oak Hill	582	3	18	561
		(1)	(3)	(96)
Oak Springs	321	303	18	—
		(94)	(6)	
Odom	1032	25	240	767
		(3)	(23)	(74)
Ortega	399	243	145	11
		(61)	(36)	(3)
Palm	419	—	394	25
			(94)	(6)
Pease	254	47	53	154
		(18)	(21)	(61)
Pecan Springs	537	205	53	279
		(38)	(10)	(52)
Pillow	538	8	30	500
		(1)	(6)	(93)
Pleasant Hill	821	22	172	627
		(3)	(21)	(76)
Read	681	70	37	574
		(10)	(6)	(84)
Reilly	278	4	78	196
		(1)	(28)	(71)
Ridgetop	228	2	111	115
		(1)	(49)	(50)
Rosedale	266	7	52	207
		(3)	(19)	(78)
Rosewood	160	156	4	—
		(98)	(2)	
St. Elmo	975	32	321	622
		(3)	(33)	(64)
Sims	494	455	34	5
		(92)	(7)	(1)
Summitt	201	—	1	200
				(100)

School	*Total*	*Black*	*Mexican-American*	*Anglo*
Sunset Valley	611	20	61	530
		(3)	(10)	(87)
Travis Heights	762	93	301	368
		(12)	(40)	(48)
Walnut Creek	308	3	42	263
		(1)	(14)	(85)
Webb	897	169	122	606
		(19)	(14)	(67)
Winn	544	180	34	330
		(33)	(6)	(61)
Wooldridge	747	32	80	635
		(4)	(11)	(85)
Wooten	635	18	85	532
		(3)	(13)	(84)
Zavala	415	23	384	8
		(6)	(92)	(2)
Zilker	541	23	100	418
		(4)	(19)	(77)
ELEMENTARY SCHOOLS TOTALS	30,567	4989	7242	18,336
		(16)	(24)	(60)
GRAND TOTAL	58,920	9110	13,266	36,544
		(15)	(23)	(62)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA	( )	
	( )	
	( )	**Civil**
	( )	**Action**
VS.	( )	**No. A-**
	( )	**70-CA-80**
	( )	
TEXAS EDUCATION AGENCY, ET AL.	( )	
(Austin Independent School Dist.)	( )	

MEMORANDUM OPINION AND ORDER

This school desegregation suit is before this Court on remand from the Fifth Circuit Court of Appeals, 467 F.2d 848 (1972). The suit was originally brought by the United States Department of Justice to challenge alleged segregation of black and Mexican-American students in the Austin Independent School District (AISD). On July 19, 1971, this Court approved, with modifications, a school desegregation plan proposed by the AISD. On appeal, the Circuit Court, aware of the equivocation by the Department of Justice, permitted intervention by interested black and Mexican-American citizens of Austin. The Justice Department's equivocation has been manifested by an unwillingness, continuing to this day, to submit a plan which it would consider appropriate to remedy the segregation it

alleges to exist in the AISD. This Court is now once again in the position of being compelled to pass upon the adequacy of a student assignment plan submitted by the AISD. The Court having heard all evidence, testimony, stipulations and argument presented by the parties, now sets forth its Findings of Fact and Conclusions of Law in this Memorandum Opinion and Order.

I. DISCRIMINATION AS TO BLACKS

Prior to Brown v. Board of Education, 347 U.S. 483 (1954) the AISD was required by State law to segregate black and white students. Shortly after the Supreme Court's declaration that the operation of such a dual school system contravened the Constitution, the AISD began a voluntary program of desegregation until by 1963, enforced segregation was completely removed from the school system. While the District's efforts during that time undoubtedly fell short of the subsequently-proclaimed "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which discrimination would be eliminated root and branch," Green v. County School Board of New Kent County, 391 U.S. 430, 437-38 (1968), its voluntary actions during a time when many Southern communities were violently rejecting any desegregation whatsoever reflects a desire to comply with the law and to eschew discriminatory segregation.

Nonetheless, the fact is clear that the AISD, at some time in the past, has engaged in discriminatory assignment of black students to promote segregation. As the Supreme Court has said, "If the actions of school authorities were

to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less 'intentional'." Keyes v. School District No. 1, _____U.S._____, 41 U.S.L.W. 5002, 5008 (June 19, 1973). Consequently, the AISD must now show that it has dismantled its old dual school system, and converted to an integrated unitary school system.

II. DISCRIMINATION AS TO MEXICAN-AMERICANS

Indisputably, some eight elementary, two junior high, and one senior high schools in Austin educate disproportionately large numbers of Mexican-American students. The Fourteenth Amendment, of course, prohibits segregation in public schools if it results from state action. As the Fifth Circuit has noted, two distinct factual determinations are required to support a finding of unlawful segregation: "First, a denial of equal educational opportunity . . ., defined as racial or ethnic segregation. Secondly, this segregation must be the result of state action." Cisneros v. Corpus Christi Independent School District, 467 F.2d 142, 148 (5th Cir. 1972).

Inasmuch as the AISD has, in the past, maintained a dual school system insofar as black students are concerned, we must first determine whether this policy was "separate, identifiable and unrelated," Keyes, supra at 5009, to the District's treatment of Mexican-American students. Clearly it was. The AISD's old statutorily required dual school system was based upon discrimination

between whites and blacks. Mexican-American students are, and always have been, classified as "white" by the AISD. The historic legal treatment of black and Mexican-American students has been completely different. Moreover, the treatment of Mexican-American students was wholly unrelated to maintenance of the black-white dual school system.

The School District having demonstrated that the black-white dual system did not create a dual school system insofar as Mexican-American's were concerned, we must consider whether the AISD has rebutted ". . . petitioners' prima facie case of intentional segregation [of Mexican-American's] . . . raised by the finding of intentional segregation [of blacks] . . ." Keyes, supra at 5009.

> There, the Board's burden is to show that its policies and practices with respect to school site locations, school size, school renovations and additions, student attendance zones, student assignment and transfer options, mobile classroom units, transportation of students, assignment of faculty and staff, etc., considered together and premised on the Board's so-called "neighborhood school" concept, either were not taken in effectuation of a policy to create or maintain segregation [of Mexican-American's] . . ., or, if unsuccessful in that effort, were not factors in causing the existing condition of segregation in these schools.

Id.

We begin by observing that there has never been any statute, rule, regulation, or policy of the AISD which prohibited Mexican-American students from attending school

with Anglo students. Mexican-American and Anglo students have attended schools and classes together at virtually all times during the operation of the AISD. Notwithstanding this uncontroverted fact, we must determine whether the AISD has ever exhibited a purpose or intent to promote segregation of Mexican-American students. "We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred in Swann [v. Charlotte-Mecklenburg, 402 U.S. 1 (1971).] is *purpose* or *intent* to segregate." Keyes, supra at 5007

Perhaps the strongest showing of an allegedly segregative intent toward Mexican-American's is in the creation of the West Avenue, Comal Street and Zavala schools. West Avenue served grades 1-3 from 1916 until 1947. Comal Street was closed in 1936. Zavala operated as a special school from 1936 until 1954, when it was given an attendance zone similar to any other school. These schools were designed to serve the educational needs of non-English speaking students, and students who were members of migrant farm-working families and who could not, consequently, attend school for a full normal school year. In this day of educational innovation, the Court notes that many of the teaching methods used in these schools may now be considered outdated and inadequate. Nonetheless, the Court is of the strong opinion that the existence of these schools represented no more than a humane and compassionate attempt by the School District, using the educational techniques then accepted as proper and progressive, to meet the special educational needs of children who would otherwise have been much more severely handicapped in their efforts to obtain an education. More-

over, Mexican-American students were not required to attend these special schools. On the contrary, substantial numbers of Mexican-American students attended other predominantly Anglo schools throughout the District during this time. The Court finds that these three schools, all of which were open schools with no attendance zones while operating as special schools, had no effect on the racial or ethnic housing patterns in the District.

Of the seven predominantly Mexican-American elementary schools in the District other than Zavala, five (Becker, Palm, Metz, Dawson and Govalle) opened as predominantly Anglo schools. These five schools gradually became predominantly Mexican-American because of shifting residential patterns, and their transformation was in no way caused by any action of the AISD. The District has clearly shown the lack of a segregatory intent or purpose regarding these schools.

The other five predominantly Mexican-American schools in the District (Allison and Brooke Elementary, Martin and Allan Jr. High, and Johnston High Schools) did open with a predominance of Mexican-American students. The record reflects however, that these schools were, without exception, located as they were solely because of growth in the East Austin area and the need for new schools to serve the area. The area of heaviest black and Mexican-American concentration in the District, referred to herein as East Austin, is a relatively isolated area. It is bounded on the south by the Colorado River, across which access is inadequate. To the west of the area are a major interstate highway, the University of Texas, and the State Capitol complex. Barricading the north end of the area is the Austin Municipal Airport. On the eastern edge

of the area is the AISD boundary. Thus, schools built to serve growth in East Austin could necessarily serve *only* that area unless the historically-honored "neighborhood school" concept were completely abandoned. The location of schools within this area had little immediate impact, and virtually no long-term impact, upon the integration of Anglo and Mexican-American students.

After a thorough review of the evidence the Court finds that the AISD has successfully demonstrated that its policies with regard to school site location, school size, school renovations and additions, student attendance zones, student assignment and transfer options, mobile classroom units, transportation of students, assignment of faculty and staff, etc., were not effectuated as part of a policy of promoting segregation of Mexican-American's. Rather, the Court finds that the AISD has demonstrated an absence of segregatory intent or purpose toward Mexican-American's. Consequently, a decree by this Court for "all-out desegregation" of Mexican-American's would be improper. Keyes, supra at 5009.

Our obligation to assure to the Mexican-American intervenors in this case the equal protection of the laws does not end with our finding that such segregation of Mexican-American's as does exist in Austin is not the result of a segregatory intent or purpose on the part of the AISD. Mexican-American's in Austin constitute an identifiable ethnic minority, recognizable by their numbers, concentration, cultural uniqueness, and common special needs and problems. We find that Mexican-American students in Austin constitute "an identifiable, ethnic-minority class entitled to the equal protection guarantee of the Fourteenth Amendment." Cisneros, supra at 149. As such,

Mexican-American students are entitled to proper implementation of steps necessary to assure them the equal protection of the laws and an equal educational opportunity, including implementation of a curriculum and special educational programs, such as bilingual-bicultural education, necessary to provide equal educational opportunities for Mexican-American students as a group.

III. THE REMEDY

The AISD has submitted a compilation of its record in converting to a unitary school system and fulfilling its obligation to implement a curriculum and special educational programs necessary to provide equal educational opportunities for black and Mexican-American students. Additionally, it has submitted a "Sixth Grade Center Plan" and an alternative "Fifth and Sixth Grade Center Plan" by which the mixing of black and white students will be promoted.

Austin junior and senior high school students are fully desegregated. The closing of the old Anderson High School and Kealing Junior High School has been challenged by the black Intervenors. Testimony indicated, however, that the old Anderson (the Anderson name has been retained and transferred to the new high school due to open for the 1973-74 school year, serving the predominantly Anglo northwest area of Austin; this action will make Austin one of the comparatively few cities in Texas to have a predominantly Anglo high school named in honor of a black person) facility was inadequate to continue as a high school. One option would have been to

convert it to a junior high school. The AISD has now, however, designated the facility as a location for the newly-created community college in Austin. As such, the facility will draw students from throughout the District. We find this use of the facility to be fully as acceptable as any other possible use. Testimony further indicated that only a part of the Kealing facility would be acceptable for continued use. Rather than operate on this basis, the District determined that the facility should be closed and its students re-assigned. We find no impermissible closing of schools solely for racial reasons. Cf. Lee v. Macon County Board of Education, 448 F.2d 746 (5th Cir. 1971). Moreover, the impact of the closing of these facilities will be greatly alleviated with the opening of the new Lyndon B. Johnson (Northeast) High School in 1974, and the projected construction of a new Northeast Junior High School. These facilities will be placed in racially neutral locations, drawing naturally desegregated student bodies.

The desegregation of elementary schools presents the greatest problem in this case. Elementary zones have traditionally been small in Austin, and the facilities, drawing students only from their immediate neighborhoods, have been correspondingly small. As we have previously discussed, East Austin is a locked-in, relatively inaccessible part of Austin. The only portion of Austin readily accessible from East Austin is Northeast Austin. The schools in Northeast Austin are, however, already largely integrated, and any attempt to use this area alone as the AISD's desegregative tool would be inequitable, would upset natural patterns of integration, and would very likely result ultimately in total resegregation.

Additionally, the predominantly Mexican-American Southeast Austin area could be used to desegregate black

schools. This would, however, be intolerable. As this Court has stated, "All too often, the practical effect of the 'desegregation' of school systems has been that black students are mixed with Mexican-American students, thus denying to both groups the benefit of any meaningful desegregation. Schools with substantial Mexican-American populations cannot be made to carry a disproportionate share of the burden of desegregation." Arvizu v. Waco Independent School District, at 8, Civil Action No. W-71-CA-56 (W.D. Tex. April 27, 1973).

Clearly, the entire community must be involved in any effort to desegregate the black East Austin elementary schools. The Sixth Grade Center Plan submitted by the AISD does involve the entire community in the desegregation of at least one grade of the elementary school years. Involvement of the entire community in desegregation of additional grades (even the District's Fifth and Sixth Grade Center Plan does not involve all students in the District in both grades) would involve progressively massive transportation, the uprooting of children in their earliest formative years, and would be educationally dysfunctional. Considering the "age of the children, and the risk to health and probable impingement of the educational process," United States v. Texas Education Agency (Austin Independent School District), 467 F.2d 848, 885 (5th Cir. 1972) (Bell, J., specially concurring), we find that the time required for transportation, risk to health, and probable impingement of education for students younger than the sixth grade would be prohibitive under any such plan.

In assessing the AISD's proposal, we note the language of Mr. Justice Powell:

The term "integrated school systems" presupposes, of course, a total absence of any laws, regulations of policies supportive of the type of "legalized" segregation condemned in Brown. A system would be integrated in accord with constitutional standards if the responsible authorities had taken appropriate steps to (i) integrate faculties and administration; (ii) scrupulously assure equality of facilities, instruction and curricula opportunities throughout the district; (iii) utilize their authority to draw attendance zones to promote integration; (iv) locate new schools, close old ones, and determine the size and grade categories with the same objective in mind. Where school authorities decide to undertake the transportation of students, this also must be with integrative opportunities in mind.

> . . . An integrated school system does not mean—and indeed could not mean in view of the residential patterns of most of our major metropolitan areas—that *every school* must in fact be an integrated unit. A school which happens to be all or predominantly white or all or predominantly black is not a "segregated" school in an unconstitutional sense if the system itself is a genuinely integrated one.

Keyes, supra at 5012 (Powell, J., concurring in part and dissenting in part). We note that in addition to its submitted Sixth Grade Center Plan the AISD has taken other steps to effect its conversion to a unitary integrated system, including: (i) A commitment to employ a black and a Mexican-American assistant superintendent to work at the cabinet level with system-wide responsibilities and to provide special assistance in the development of programs and activities for black and Mexican-American students; (ii) Establishment of majority-to-minority transfer provisions

for both black and Mexican-American students, with free transportation provided; (iii) A commitment to employ five elementary assistant directors who will, *inter alia*, supervise and evaluate programs; (iv) Implementation of many innovative programs designed to aid minority students, including bilingual-bicultural educational programs; (v) Alteration of existing school attendance zones and the drawing of attendance zones for new schools to promote desegregation; and (vi) Construction and projection of new schools to be located in such a manner as to maximize integration.

Thus, although the Sixth Grade Center Plan contemplates the continued operation of several predominantly black schools, we find that it, combined with the District's other efforts and commitments, will render the AISD to be a unitary and integrated school system. In approving the Plan, however, we wish to emphasize that all its components are a legal obligation of the District. The District's commitments—to integrate the administration, to maintain an integrated faculty and continue to seek qualified Mexican-American teachers, to assign faculty members to schools in a nondiscriminatory manner (we construe this to mean that teachers in predominantly minority schools shall be equivalent to teachers in predominantly Anglo schools according to such objective criteria as experience and educational background), to scrupulously assure equality of facilities, to assure equality of educational opportunities through programs especially designed to meet the needs of black and Mexican-American students, to utilize its authority to draw attendance zones to promote integration, and to locate new schools, close old ones, and determine the size and grade categories to promote inte-

gration—are all legal obligations which shall be strictly enforced by the Court. Likewise, the District must afford Mexican-American's protection against bearing a disproportionate burden of desegregation of black students, and must promote rather than retard tri-ethnic integration as part of its legal obligation.

This Court shall retain jurisdiction of this cause, and the School District is directed to report to the Court semi-annually, on or about January 15, and July 15, of each year, regarding the status of integration in the AISD. Included in these reports shall be: the status of faculty and administration integration; the comparative objective qualifications of teachers in predominantly minority schools *vis-a-vis* the objective qualifications of teachers of that grade level in the District as a whole; the addition or elimination of any programs especially designed to meet the educational needs of black and Mexican-American students; the status of efforts to draw school attendance zones and locate new schools to promote integration; the status of the District's commitment to scrupulously assure equality of facilities; a report regarding utilization of the District's majority-to-minority transfer plan; and the status of student integration in each school in the District. Additionally, this Court shall require that prior to any change in school attendance zones and prior to construction of any new school by the District, the Board shall notify counsel for Plaintiff and Intervenors of such proposal. If, within thirty (30) days, counsel for Plaintiff and Intervenors have made no objection thereto, the proposal shall be considered approved by the Court. If, within thirty (30) days, objection is made, the Court shall hear and resolve the dispute by approving or disapproving the proposal. It is accordingly

ORDERED, ADJUDGED and DECREED that the Sixth Grade Center Plan submitted by the Austin Independent School District be, and hereby is, APPROVED, under the terms and conditions set out herein. We attach hereto, and incorporate herein, a copy of the Plan. This Memorandum Opinion and Order shall constitute Findings of Fact and Conclusions of Law.

Entered at Austin, Texas, this 1st day of August, 1973.

_____

United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA	( )	
	( )	
	( )	
	( )	**Civil**
VS.	( )	**Action**
	( )	**No. A-**
	( )	**70-CA-80**
	( )	
TEXAS EDUCATION AGENCY, ET AL.	( )	
(Austin Ind. School District)	( )	

MEMORANDUM OPINION AND ORDER

On June 28, 1971, this Court entered an Order determining the absence of *de jure* segregation against Mexican Americans, but the continuation of the vestiges of a dual school system as regards Blacks. This Order incorporates that earlier Memorandum Opinion and Order and proceeds to outline a plan for eliminating the dual school system.

Despite this Court's repeated requests for a joint plan, the parties were able to agree only as to the high school integration plan submitted by the Austin Independent School District. *See* Report and Submission filed July 15, 1971. As regards junior highs, the Plaintiff continued to disregard this Court's guideline three as to the unsuitabili-

ty of Anderson for a junior or senior high facility. The previously determined unsuitability of the Anderson facility, the greater costs, and longer transportation time involved in the Plaintiff's plan require this Court to reject it. *See* Defendant's Exhibits 37 and 82.

In reviewing the plans submitted for elementary school integration, this Court first reiterates its guideline calling for minimized busing. The testimony at the earlier hearing of this case convinced this Court that extensive crosstown busing could only harm the local education system. Dr. Cecil Hardesty, Superintendent of Schools in Jacksonville, Florida, an unbiased educational expert who has had extensive experience with crosstown busing ordered in his school district, delineated the many adverse effects from this remedial technique. The added time requirements imposed on students by busing often reduce attendance and produce higher dropout rates, especially among minority students, and limit the opportunity of all transported students to participate before and after school in extracurricular activities, which both parties agree are an important factor in the educational process. Busing similarly reduces parental participation in school activities, particularly where it necessitates dividing a family's children among a number of schools. It also taxes the capability of health facilities in individual schools to deal with at-school injuries and illnesses. Of course, the objections to busing thus far enumerated might in many circumstances apply with equal validity to the traditional role bus transportation has played in overcoming the geographical separation between pupil and school. However, such objections take on a new and much larger dimension in the urban environment where massive transportation of students is involved.

Moreover, both Dr. Hardesty and Dr. Davidson further testified that busing students simply to achieve racial balance, as opposed to the traditional function of bus transportation, raises new educational problems not heretofore experienced. Transportation of students, particularly the very young, from their home neighborhoods into strange and often hostile environments causes raised anxiety levels in both students and their teachers that constitute psychological barriers to learning progress, and subjects students to traumatic experiences that they are not equipped by age or experience to handle. The Court is also aware of other barriers posed by community opposition to forced busing. Cf. United States v. Haynes, _____F.2d_____ No. 71-1165 (5th Cir. June 17, 1971). Because such large numbers of students must be transported within a reasonably short period of time, busing to achieve desegregation in Austin will necessitate assembly of students at their neighborhood schools prior to transporting them to another school. Thus inclement weather may pose problems in sheltering up to twice the school's student capacity during the busing period in the morning and afternoon. Moreover, in Austin, the bus routes would require transporting many students through a heavy traffic complex consisting of downtown Austin (Colorado River to 11th Street), the Capitol complex (12th Street to 19th Street) and the University of Texas campus (19th Street to approximately 27th Street). The traffic situation is further complicated by the fact that Interstate Highway 35, which is the main north-south traffic artery in Austin, is undergoing major construction work involving the closing of traffic lanes and various detours. This Court therefore finds that the traffic situation presents a serious and

substantial obstacle to the safe transportation of school children. Finally, it should be noted that transportation costs in excess of those normally incurred in the traditional function of busing are essentially a non-productive expenditure, since such costs contribute little, if anything to academic achievement. Dollars spent on additional buses, driver's salaries, gasoline, tires and other maintenance yield little or no educational return to the community; dollars spent on productive programs, teacher's salaries, books, facilities and teaching equipment do.

Accordingly, this Court finds as a fact that busing to achieve desegregation in the Austin community will result in serious interference with the educational process. Because of this, the Court has examined both the HEW Recommendations and the AISD plan with a view toward minimizing busing and maximizing the use of neighborhood schools. Normally, in fashioning a remedy, the recommendations of the Department of Health, Education & Welfare are entitled to great weight, U.S. v. Jefferson County Board of Education, 372 F.2d 836, 847 (5th Cir. 1966), and "the school districts are to bear the burden of demonstrating beyond question, after a hearing, the unworkability of the [HEW] proposals . . . ." Carter v. West Feliciana Parish School Bd., 396 U.S. 290, 292 (1969) (concurring opinion of Justice Harlan.) In the instant case, however, the evidence adduced at trial, especially the uncontradicted testimony of Mr. Cunningham and Dr. Davidson, shows that despite AISD's repeated attempts to communicate with HEW, over a period of several months, nothing was forthcoming from HEW until approximately 30 days prior to trial. At this time, HEW filed with this Court its comments on the desegregation

plan formulated by the AISD. These comments (Letter from Thomas Kendrick, Senior Program Officer to Dr. Jack Davidson, Superintendent, AISD, dated and filed May 14, 1971) [Hereinafter called HEW Recommendations] as they have been amended at trial through the introduction of Plaintiff's Exhibits 23, 25 and 26, and the Report and Submission filed with this Court on July 15, 1971, constitute the only documentary evidence of any desegregation plan developed by HEW. At trial, several further modifications to the HEW Recommendations were revealed for the first time through the oral testimony of Mr. A. T. Miller, the HEW Project Officer. The only explanation offered by HEW for this course of conduct was the testimony of Mr. Miller that he was not authorized to deviate from the HEW plan, which had been drawn in Washington, D.C., but that he had been "available" for consultation throughout the pendency of the suit. The fact remains, however, that the AISD was not given the benefit of HEW recommendations in drawing its plan, despite repeated efforts to obtain such recommendations, until approximately 30 days prior to trial. This inflexibility on the part of HEW is inconsistent with this Court's understanding of the role to be played by HEW in the complex, difficult task of urban school desegregation, and it is further inconsistent with the clear and obvious purpose of this Court's Order of September 4, 1970, directing the parties to attempt agreement on a common desegregation plan. This case thus appears to depart substantially from the usual run of school cases in that here the uncommunicative, uncooperative and recalcitrant party has been not the local school board, but the Department of Health, Education and Welfare.

This Court has therefore weighed both plans according to their relative merits under the two-pronged test developed in the cases:

(1) Does the plan convert *now* the existing dual school system "to a unitary system in which racial discrimination would be eliminated root and branch?" Green v. County School Board, 391 U.S. 430, 437-38 (1969), and

(2) Is the plan "reasonable, realistic and workable?", Swann v. Charlotte-Mecklenburg Board of Education, supra, at 575.

HIGH SCHOOLS

The parties have agreed that the plan submitted by AISD for implementation in the Fall of 1971 (see Defendants' Exhibits Nos. 35 and 37) would assign all black high school students to schools that are not identifiable as Negro schools, (Report and Submission of July 15, 1971, at I), and the Court so finds. The AISD plan for the high schools, (Alternate Plan No. 2, for the 1971-72 school year) together with the planned construction of three new high schools and proposed revision of attendance zones, (Alternate Plan No. I, for the 1973-74 school year) meets all constitutional requirements and is therefore APPROVED.

JUNIOR HIGH SCHOOLS

The parties similarly agree that the AISD plan for junior high schools, (Defendants' Exhibit No. 36, Alternate Plan

No. 2, as modified by the closing of Kealing Jr. High School for the 1971-72 school year) would assign all black junior high school students to schools that are not identifiable as Negro schools, although HEW expresses doubt that this would comply with the fourth guideline contained in this Court's Memorandum Opinion and Order of June 28, 1971, since it, together with AISD's high school plan "unnecessarily places on the black community the entire burden of desegregating on the secondary level." Report and Submission of July 15, 1971, at 2-3. The guideline in question was addressed to any attempt on the part of either party to achieve desegregation merely by integrating blacks with Mexican-Americans as opposed to integrating them throughout the entire community. Although some of the same considerations of fairness support HEW's position, this Court believes that they are outweighed by the continuity of zone lines and feeder patterns, decreased likelihood of "white flight", transportation efficiencies and coordination with the AISD elementary plan afforded by the AISD junior high plan. Moreover, the HEW proposals for secondary schools disregard an additional cost of some $246,200. for portable buildings made necessary by the crowding of some facilities and drastic underutilization of others under the HEW plan, and involves the use of Anderson High School as a junior high facility, which this Court finds unsatisfactory. The AISD junior high school plan (Alternate Plan No. 2), as modified by the closing of Kealing Jr. High, also meets all constitutional requirements and is APPROVED.

ELEMENTARY SCHOOLS

Austin's 55 elementary schools, which are widely scattered across the city to meet neighborhood needs, pose the major problem in implementing an effective desegregation program. HEW suggests pairing for a few contiguous attendance zones, but in the main recommends the groups of contiguous zones be "clustered" with "satellite" or noncontiguous zones. *See* HEW Recommendations at 3-5 and Attachment 1, and Plaintiff's Exhibit 1. Each cluster, usually consisting of one predominately Black school, one predominately Mexican-American school, and four predominately Anglo schools, would be thoroughly integrated on a daily basis through extensive cross-town busing. Mr. Miller, the HEW Project Officer, indicated that in each cluster all students in one of the schools, or several grades could be divided among several of the schools in the cluster. In the Report and Submission of July 15, 1971, HEW further suggests "full time pairing of the five all-black elementary schools (counting Rosewood and Oak Springs as one school encompassing grades one through six) with ten or more non-contiguous Anglo schools."

While employing a form of clustering similar to that proposed by HEW at trial, (*See* Defendant's Exhibit 78 at 16) AISD offers a unique new approach to elementary desegregation. Integrating not only people, but the entire educational process, the AISD plan creates learning resource centers, provides inter-school visitations, and sponsors joint field study trips. A "Companion School Team Planning Advisory Council", composed of representatives from each school in a given cluster as well as

staff representatives, would develop integrated educational programs for the cluster. As explained more fully in Defendant's Exhibit 80,

> [t]he primary purpose of the multi-cultural learning activities at the Learning Resource Centers is to provide new dimensions of understanding by placing greater emphasis on the cultural influences and contributions of various ethnic groups of American society.

To accomplish this objective, one center each for fine arts, social sciences, avocations, and science, would be established in vacant or underutilized facilities designated by AISD. According to Defendant's Exhibit 78, "Major Program Thrusts" would be "1. Bolster academic programs in one race schools (cognitive learning) [and] 2. Develop wholesome attitudes and understandings (affective learning)." As "a major portion of the social studies curriculum", these centers will concentrate on "instructional groups" "composed of "four multi-ethnic student teams consisting of 6, 7, or 8 students each, depending on the size of the companion school group." Defendant's Exhibit 80. These instructional groups would regularly be assembled for inter-school visits, field study trips, and planned programs at the learning resource centers. The bus transportation used both to assemble the groups and transport them to these activities would be integrated into the educational program through the use of supervised on-bus activities.

Under the AISD plan the Court finds that elementary students would be in a desegregated environment as much as twenty-five (25) percent of the school year. This Court

further finds that the AISD elementary plan, particularly in its creation of learning resource centers, possesses great educational benefits. It is a program designed specifically to develop in elementary school children the capacity to understand, appreciate and respect cultural values other than their own by providing, in a structured, supervised program, a common bond of experience with members of other ethnic groups. The central thrust of the AISD plan is to eliminate the mutual fears that lie at the heart of racial prejudice, and the discriminatory attitudes that flow from such fears, through educational activities specifically tailored to reach this objective. Its underlying premise is that meaningful and effective desegregation depends primarily on the quality, and only secondarily on the quantity, of the multicultural experiences to which each elementary school child is exposed.

HEW attempts to stigmatize this innovative proposal with the label "part-time desegregation", relying on *Bivins v. Bibb County Board of Education*, 424 F.2d 97,98 (5th Civ. 1970) where only 25% of the Negro students were attending formerly all-white schools and only "nine percent of the white students were participating or waiting to participate on a part-time basis in virtually all of the all-Negro schools in response to the incentive of special courses there . . . ." No such scheme is proposed by the AISD elementary plan, which is mandatory on all elementary students and which encompasses virtually all of the system's Anglo elementary students for a much larger portion of their academic time in a far wider and more meaningful range of multicultural experiences. This Court therefore considers *Bivins v. Bibb County, supra,* inapplicable to this case.

Nor can the HEW Recommendations be said to provide more satisfactory distribution of ethnic groups. Plaintiff's Cluster #5, when examined in view of the more accurate enrollment figures provided in Defendant's Exhibit 79, includes only eighteen Blacks or about 1% of the cluster's student population; Cluster #6 includes only twenty-one Blacks or about 2%. *See* HEW Recommendations, Attach. E for composition of clusters. At the same time HEW would pair three schools—Becker, Mathews, and Pease—which, as indicated in Defendant's Exhibit 79, are already integrated on a tri-ethnic basis.

While the HEW Recommendations strictly avoid any discussion of implementation methods, which, of course, form the core of any determination as to reasonableness and workability, Mr. Miller's testimony indicates almost total reliance upon extended daily busing of 89% elementary students. *See* Plaintiff's Exhibit 26. This Court finds as a matter of fact that this proposal entails all the educational disadvantages of busing previously discussed. Moreover, the cost comparison of the HEW proposal with that of AISD is startling. Because the AISD can employ during the school day at the elementary level the same buses used to transport secondary students, no additional equipment is required. Consequently, expenditures would be held to $100,000. in operating costs. Defendant's Exhibit 82. In this same exhibit, the AISD estimates that the HEW elementary proposal would cost $1,708,000.—$1,573,000. for transportation, and $135,000. for additional portable rooms. Even the Plaintiff's Exhibit 26, with its understatement of the number of buses required to implement the HEW Recommendations estimates total first year costs of $717,900. This Court finds as a matter

of fact that, by either estimate, the cost of this proposal places an unreasonable burden upon the school district. This Court further finds that the minimum number of buses necessary to implement the HEW proposals cannot be obtained until late in the 1971-72 school year. See direct testimony of Dr. Leon R. Graham.

After a review of the evidence, particularly Defendant's Exhibit 82, Attach. A, this Court finds that the AISD plan is preferable also because it imposes lesser time burdens on students in going to and from school and lessens traffic hazards. Unlike the HEW Recommendations, the limited amount of busing required by the AISD will occur during hours of lessened traffic flow, as a part of the learning day with teacher participation. This Court finds that the AISD plan minimizes the disadvantages inherent in busing.

The AISD elementary plan is a wholly new approach to the problems of desegregating elementary schools locked deeply in areas of urban minority concentration. Under difficult circumstances, the plan achieves maximum desegregation consistent with reasonable cost, student safety and educational soundness. It is the finding of this Court that Defendants have met their burden of showing the non-feasibility of the HEW proposals, and that the AISD elementary plan is the only physically possible desegregation plan for the 1971-72 school year because of the non-availability of additional buses until late in the second semester.

With the closing of St. John's Elementary School, a predominantly black school, the students of which can easily be assigned to neighboring schools, and the addition of a majority-to-minority transfer provision, the AISD elementary plan will also meet all constitutional requirements.

CONCLUSION

Upon implementation of the AISD plans for the high schools, junior high schools and elementary schools, as modified herein, the defendant school district will be in full compliance with the previous Orders of this Court dated September 4, 1970, December 15, 1970, February 26, 1971, and April 14, 1971, all terms of the Civil Rights Act of 1964, and the constitutional principles announced in Brown v. Board of Education, 347 U.S. 483 (1954), Green v. County School Board, 391 U.S. 430 (1968), and Swann v. Charlotte-Mecklenburg Board of Education, _____ U.S. _____, 28 L.Ed.2d 554 (1971), and will have achieved a unitary school system. This memorandum Opinion shall constitute this Court's findings of fact and conclusions of law pursuant to Rule 52, Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing memorandum Opinion, it is ORDERED, ADJUDGED and DECREED that"

1. Alternate Plan No. 2, proposed by the Austin School Board, is to be put into immediate effect subject to the following modifications:

a. Kealing Junior High School is to be closed for school year of 1971-72.

b. St. Johns Elementary School is to be closed and its students reassigned to the neighboring white schools.

c. Paragraphs B, C, F and G of the interim Desegregation Plan for the Austin Independent School District

implemented by this Court's Order of September 4, 1970, shall remain in effect.

2. The site locations for the proposed high schools, junior high schools, and elementary schools are hereby approved; the School Board is further ORDERED to report back to this Court on June 1, 1972, and every six (6) months thereafter, on the site acquisition, progress, planning and construction of new schools.

3. Since the AISD plan for elementary desegregation is unique in approach, the Board will report to this Court on October 1, 1971, and each February 1, and June 1, of succeeding years the progress made in desegregation at all levels with special emphasis on information pertinent to the elementary program, such reports to include, but not be limited to, student involvement, racial composition of staff and students, participation in extracurricular activities, and transportation utilized to accomplish both Board Alternate Plan No. 2 and the AISD plan for elementary schools.

4. Prior to the occupation of the new high schools and junior high schools at Northeast High School, Northwest High School, Austin High School, Rundberg Lane Junior High School, Northeast Junior High School, and the South First Street Junior High School, the Board will submit to this Court a projected ethnic composition for each school so that this Court can determine whether the features of Alternate Plan No. 2 should be continued or altered.

5. As authorized by the Supreme Court in *Swan v. Charlotte-Mecklenburg Board of Education, supra,* this Court will retain jurisdiction of this case to insure that the unitary system hereinabove provided and required is oper-

ated in accordance with these Orders to achieve the objective specified. For this purpose, it is required that the Austin School Board shall, on or before the 1st day of the months of November, December, February, March, April and May, during the 1971-72 school year, submit to this court reports each of which shall cover the following topics:

a. Students, including (1) the number of students by race enrolled in the school district; (2) the number of students by race enrolled in each school in the district; (3) the number of students by race enrolled in each classroom in each of the schools in the district; and (4) the number of school days during each month that each child has participated in multi-cultural activities pursuant to the elementary school program, broken down by learning resource center visits, inter-site visits, and field-study trips.

b. Teachers, including (1) the number of full-time teachers by race in the district; (2) the number of full-time teachers by race in each school in the district; (3) the number of part-time teachers by race in the district; and (4) the number of part-time teachers by race in each school in the district.

c. Transfers, describing the requests and results which have accrued by race, under the majority-to-minority transfer provision which is a part of this Court's Order.

d. Specifying any change which may have been made in the boundaries of any zone or zones.

e. Transportation system, including the number of vehicles in use and the extent to which black and white students are transported daily on the same buses.

f. Utilization of equipment, including a statement that all gymnasia, auditoriums, cafeterias and like facilities are being operated on an integrated basis.

6. If it appears that the plan hereby adopted does not in actual fact and in operation provide the unitary system for which it was designed and adopted, the Order of this Court may be changed to whatever extent necessary to accomplish the objective.

SIGNED at Austin, Texas, this _____ day of July, 1971.

_____

United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA	( )	
	( )	
	( )	**Civil**
	( )	**Action**
VS.	( )	**No. A-**
	( )	**70-CA-80**
	( )	
	( )	
TEXAS EDUCATION AGENCY, ET AL.	( )	
(Austin Ind. School District)	( )	

MEMORANDUM OPINION AND ORDER

On August 7, 1970, the Attorney General of the United States, on behalf of the United States, initiated this action against the Texas Education Agency, the State Commissioner of Education, and seven school districts. This Opinion constitutes Findings of Fact and Conclusions of Law concerning those allegations against Defendant Austin Independent School District [hereinafter referred to as AISD].

Plaintiff alleges that AISD, contrary to the Civil Rights Act of 1964, 42 U.S.C. §2000c-6(a) and (b) and the Fourteenth Amendment to the United States Constitution, "has traditionally operated and continues to operate a dual school system based on race." In addition, Plaintiff

contends that AISD is "discriminating against Mexican-American students by assigning Mexican-American students to schools on the basis of their ethnic origin . . . . [and by] maintaining schools that are identifiable as Mexican-American schools, and schools that are attended almost exclusively by Mexican-American and Negro students."

On August 27, 1970, this Court held a hearing concerning the AISD and entered an oral Order implementing the Interim Desegregation Plan formulated by the Department of Health, Education and Welfare. After the modification of this Order on September 4, 1970, the parties were given until December 15, 1970, to submit a common plan providing for the complete desegregation of the AISD. Despite four further Orders of this Court extending this deadline, cooperation between the parties was most limited and no common plan was produced.

On May 14, 1971, Plaintiff and Defendant submitted their separate desegregation plans. Consideration of these

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[1]The Swann decision has been considered in other stages of litigation. Gaines v. Dougherty County Bd. of Education, _____F.2d_____, No. 30290 (5th Cir. June 7, 1971) (remanding student assignment plan); Davis v. School Dist. of the City of Pontiac, Inc., _____F.2d_____, No. 20477 (6th Cir. May 28, 1971) (affirming a district court desegregation plan); Johnson v. San Francisco United School Dist., _____ F.Supp. _____, No. C-70 1331 SAW (N.D. Cal. April 28, 1971) (requiring parties to file desegregation plan); Ross v. Eckels, _____F.Supp._____, No. 10444 (S.D. Tex. May 24, 1971) (denying motions to amend and to intervene).

For an excellent analysis of Swann and earlier desegregation rulings see Comment, *Busing, Swann v. Charlotte-Mecklenburg and the future of Desegregation in the Fifth Circuit*, 49 TEX.L.REV. _____1971.

plans resulted in a full scale desegregation trial.

AISD is currently composed of 54,970 students of whom 64.6% are Anglo; 20.4%, Mexican American; and 15.1%, Black. Plaintiff's Exhibit 59, at 11. These demographic data raise an initial question posed to the Court—the effect of a large ethnic minority group other than Blacks upon efforts to dismantle a dual school system. That Mexican Americans constitute a separate ethnic group has been recognized by several earlier decisions,[2] by this Court in its appointment of a *Tri-Ethnic* as distinguished from a *Bi-Racial* Advisory Committee,[3] by the testimony of AISD Superintendent, Dr. Jack Davidson, and by even the most casual examination of Mexican American culture. But the mere existence of an ethnic group, regardless of its racial origin, and standing alone, does not establish a case for integrating it with the remainder of the school population. Rather the Plaintiff must show that there has been some form of *de jure* segregation against the ethnic minority. In considering the Defendant's actions, this Court adopts the broad standard expressed in Davis v. School District of the City of Pontiac, 309 F.Supp. 734, 742 (E.D. Mich. 1970), aff'd, _____ F.2d _____, No. 20,477 (6th Cir., May 28, 1971).

> Where a Board of Education has contributed and played a major role in the development and growth of

[2]See, e.g., Hernandez v. Texas, 347 U.S. 475 (1954); Cisneros v. Corpus Christi Ind. School Dist., _____F.Supp. _____, No. 68-C-95 (S.D. Tex. June 4, 1970), noted, 49 TEX. L.REV. 337 (1971); Clifton Puente, 218 S.W.2d 272 (Tex. Civ.App. San Antonio 1948, writ ref'd n.r.e.).

[3]Order of this Court, September 4, 1970.

> a segregated situation, the Board is guilty of *de jure* segregation.

While alleging such de jure segregation, against Mexican Americans, the Plaintiff failed in maintaining its burden of proof.

Texas has never required by law that Mexican American children be segregated, and the AISD, unlike some other school systems,[4] has never enacted regulations to this effect. Since no discriminatory rule or regulation has existed, Plaintiff has sought to demonstrate a history of discriminatory practices against Mexican Americans. All that Plaintiff has succeeded in showing is that at one time the AISD had overlapping school zones for Pease and the West Avenue schools, and for Metz and Zavala. During this period, prior to World War II, the West Avenue and Zavala schools were referred to as "Mexican" schools, since their enrollment was totally Mexican American, and since their programs were designed to meet the needs of a largely migrant population with a fluctuating attendance pattern. Even during this period, there were a number of Mexican Americans attending the so-called "Anglo" schools.[5] A pattern of *de jure* segregation is not established by the statement of a former student that Mexican Americans were encouraged to attend Zavala rather

[4]See, e.g., Gonzales v. Sheely, 96 F.Supp. 1004 (D. Ariz. 1951); Mendez v. Westminister School Dist., 64 F.Supp. 544 (S.D. Cal. 1946), aff'd, 161 F.2d 774 (9th Cir. 1947); Ind. School Dist. v. Salvatierra, 33 S.W.2d 790 (Tex.Civ.App. San Antonio 1930, no writ), appeal dismissed w.o.j. & cert. denied, 284 U.S. 580 (1931).

[5]Defendant's Exhibit 69, as explained by the testimony of Arthur Cunningham, Pupil Placement Officer for AISD.

than Metz in 1936-41,[6] the testimony of an educational expert that concentration of Mexican Americans in certain schools is detrimental,[7] the opinion of an interested, but non-expert citizen that segregation continues,[8] and the implication of a recent student that the education in one minority school is inferior.[9] The only other evidence on the issue of Mexican American segregation consists of testimony by certain AISD administrators and former school board members.[10] Taken as a whole, the testimony of the witnesses, particularly that of Dr. Wilburn, Mr. Cunningham, and Dr. Davidson, conclusively shows that at no time during the existence of the AISD has there been *de jure* segregation against Mexican Americans,[11] and this

[6]Testimony of Richard Moya, Travis County Precinct 4 Commissioner.

[7]Testimony of Dr. George Sanchez.

[8]Testimony of Dr. Jorge Lara-Braud.

[9]Testimony of Mr. Alfred Munoz.

[10]Testimony of Mr. Willie Kocurek, Mr. Graham, Mr. C. N. Avery, Mr. Noble Prentice, and Mr. Will Davis.

[11]Because of this finding, which is limited to the factual setting existing in the AISD, the Court is under no constitutional obligation to integrate Mexican Americans throughout the school system. This is not to say that the mere integration of Mexican Americans with Blacks is legally sufficient to meet the command of Brown I, Brown II, and Swann. Such a plan, by placing the burden of integration upon another ethnic minority rather than upon the entire community, would clearly be inconsistent with the equitable principles which these decisions make obligatory on this Court. Moreover, Dr. Davidson specifically indicated that an earlier HEW plan to mix Blacks and Mexican Americans was not a sound educational proposal. Surely such a plan would accomplish none of the objectives announced in Brown and subsequent decisions.

Court so finds.[12]

A different situation exists as regards Black students. It is undisputed that at one time the AISD maintained a dual school system with educational opportunities separate and inherently unequal for Blacks. However, unlike many communities elsewhere in the South, the City of Austin has since *Brown II* adopted a progressive and non-discriminatory policy in the administration of its public schools. The government has made no showing that in the period from 1955 to the present the AISD has intentionally perpetuated segregation of Blacks; the record instead indicates that during this period the school administration's

[12]Specifically, the Court makes the following findings of fact, based on the record as a whole:

(a) The Austin Independent School District has never adopted, published or promulgated any written or unwritten rules, regulations or policies having as their purpose the discrimination against, or segregation or isolation of, Mexican Americans.

(b) The Austin Independent School District has never discriminated against, or attempted to discriminate against, isolate or segregate Mexican Americans in any form whatsoever, particularly in:

(1) site location of schools;
(2) school construction;
(3) drawing of school attendance zones;
(4) student assignments;
(5) faculty assignments;
(6) staff assignments;
(7) faculty and staff employment;
(8) extracurricular activities; and
(9) transportation.

(c) The Zavala and West Elementary Schools were not built for the purpose of discriminating against, isolating or segregating students on the basis of Mexican American ethnic origin.

official acts have not been motivated by any discriminatory purpose.[13] The Court therefore deals in this case only with vestiges of state-imposed segregation, in the form of some all-white and all black schools, that survived under a racially-neutral policy on the part of the local authorities. In this connection, it should be observed that those one-race schools that do exist in the system take much of their present character from historical residential patterns that developed from economic factors and from "the myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious or ethnic grounds."[14] That is to say, the racial composition of these schools, whether white, black or Mexican American, closely tracks the demography of the neighborhoods in which they are located, and while the racial segregation of Blacks formerly imposed by statute in Texas may at one time have influenced the development of these patterns, no persuasive evidence has been introduced that the local school authorities have purposefully sought to perpetuate them following repeal of the statute.

Swann v. Charlotte-Mecklenburg Bd. of Educ., supra, 28 L.Ed. 2d at 568, relying upon Green v. County School Bd., 391 U.S. 430, 435 (1968), announced that in addition to pupil placement,

> existing policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities were among the most important indicia of a segregated system.

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[13]See especially testimony of Mr. Cunningham.

[14]Swann v. Charlotte Mecklenburg Bd. of Educ., supra, 28 L.Ed.2d at 570.

Reviewing these criteria, this Court finds that the AISD has adequately desegregated faculty and staff,[15] transportation, [16] extracurricular activities,[17] and facilities.

As regards the last criterion, Plaintiff argues that the AISD has purposefully located school facilities so as to perpetuate segregation of minorities. However, the evidence adduced at trial, especially the testimony of Mr. Cunningham, shows that the AISD has followed a policy of "racial neutrality" in locating facilities. The AISD considers neighborhood need, not race, in choosing school sites.

Thus far, the Court has held that no *de jure* discrimination on the basis of race or ethnic origin has ever been practiced against Mexican-Americans in the operation of the AISD, but that vestiges of a dual system continue to exist with respect to Blacks. In light of this ruling on the Mexican-American issue, the Court is of the opinion that the parties should be given an opportunity to conduct further negotiations aimed at agreement on a common plan for the desegregation of Austin schools. It is evident that in drawing the plans heretofore submitted the parties contemplated that the Court might rule otherwise on this issue; therefore even if a common plan cannot be agreed upon the parties should be allowed to make such revisions to their individual proposals as they may deem necessary or desirable. This will ensure full and fair consideration of all the alternative remedies available for resolving the complex and difficult problems presented.

The Court offers the parties the following guidelines as they review their plans:

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[15]See especially Defendant's Exhibit 79.

[16]See especially Defendant's Exhibit 24.

[17]See especially Defendant's Exhibit 81.

(1) The parties should explore every possible avenue for arriving at a common plan. This directive simply renews and emphasizes the plain import of the Court's earlier Order of September 4, 1970, and the four separate extensions thereof, which were given the parties so that such negotiation could take place. The evidence adduced at trial revealed little, if any, effort by the parties to cooperate in compliance with these orders, and now that the parties have presented their separate plans the desirability of cooperation appears all the more obvious. A comparison of the projected enrollment figures for high schools and junior high schools from Plaintiff's Exhibits 22 and 24 with Defendant's Exhibit 37 reveals that the parties are very close to agreement, at least as to these portions of their proposals. Consequently, the Court directs the parties to develop a common proposal to resolve part of the desegregation problem, even if they cannot agree on a plan for the elementary schools. It will be far more desirable for all concerned to have the parties combine the best elements of their separate plans than to have the Court draw its own plan.

(2) By far the most pressing issue in this case is the extent to which transportation of students by bus should be utilized in achieving a unitary system. "The importance of bus transportation as a normal and accepted tool of educational policy" has been recognized by the Supreme Court[18] and by both parties to this suit in the plans they have submitted. Furthermore, it is now clear that "bus transportation as one tool of school desegregation" falls

[18]Swann v. Charlotte-Mecklenburg Board of Education, supra, at 574.

within the Court's power to provide equitable relief.[19] However, the evidence adduced at trial persuades this Court that there are severe practical limitation on the degree of busing that should be ordered in aid of desegregation. Therefore, the Court encourages the parties to combine the best elements of both their plans with a view toward minimizing busing.

(3) The testimony at trial makes clear the impossibility of the continued use of the Anderson facility as either a junior or senior high school. The size of the facility and its location away from major traffic arteries, as well as the difficulty of drawing a realistic attendance zone that will include Anglos make it impossible to integrate this school. Therefore, the parties should avoid plans which include Anderson as a junior or senior high school.

(4) Finally, the import of this Court's decision on the Mexican-American question should be clarified. Although the Court has determined that *de jure* segregation of Mexican-Americans does not exist, the Court will nevertheless consider the effect upon this ethnic minority of any plan submitted by the parties. The entire community, not just one segment of it, must bear the burden of integration. Furthermore, as both Dr. Davidson and Dr. Sanchez appropriately testified, there will be little educational value in a plan which merely integrates one socially and economically disadvantaged ethnic group, the Blacks, with another, the Mexican-Americans.

IT IS THEREFORE ORDERED that the Office of Education, United States Department of Health, Education and Welfare, and the officials of the Austin Independent

[19]*Id.* at 574-75.

School District shall immediately enter cooperative consultation respecting the proposals heretofore submitted to the Court, with the aim of agreeing upon a common desegregation plan consistent with the guidelines contained in the foregoing Memorandum Opinion.

Should the Office of Education and the school district agree upon a common desegregation plan, they shall so report to this Court by filing said plan immediately, but not later than July 16, 1971. Should the parties fail to agree in whole or in part upon a common plan, the Office of Education and the school district are both directed to file any revisions they may wish to make to all or any portion of the existing plans immediately, but not later than July 16, 1971.

SO ORDERED this the 28th day of June, 1971, at Austin, Texas.

JACK ROBERTS
UNITED STATES
DISTRICT JUDGE

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives for Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

42 U.S.C. §2000c-6. Civil actions by the Attorney General—Complaint; certification; notice to school board or college authority; institution of civil action; relief requested; jurisdiction; transportation of pupils to achieve racial balance; judicial power to insure compliance with constitutional standards; impleading additional parties as defendants

(a) Whenever the Attorney General receives a complaint in writing—

(1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, or

(2) signed by an individual, or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, sex or national origin, and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise

enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

Persons unable to initiate and maintain legal proceedings

(b) The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenever he is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property.

"Parent" and "complaint" defined

(c) The term "parent" as used in this section includes any person standing in loco parentis. A "complaint" as used in this section is a writing or document within the meaning of section 1001, Title 18.

Pub.L. 88-352, Title IV, §407, July 2, 1964, 78 Stat. 248; Pub.L. 92-318, Title IX, §906(a), June 23, 1972, 86 Stat. 375.

SUBCHAPTER I—EQUAL EDUCATIONAL OPPORTUNITIES
PART 1—POLICY AND PURPOSE

20 U.S.C. § 1701. Congressional declaration of policy

(a) The Congress declares it to be the policy of the United States that—

(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national orgin; and

(2) the neighborhood is the appropriate basis for determining public school asignments.

(b) In order to carry out this policy, it is the purpose of this subchapter to specify appropriate remedies for the orderly removal of the vestiges of the dual school system.

Pub.L. 93-380, Title II, § 202, Aug. 21, 1974, 88 Stat. 514.

20 U.S.C. §1702. Congressional findings; necessity for Congress to specify appropriate remedies for elimination of dual school systems without affecting judicial enforcement of fifth and fourteenth amendments

(a) The Congress finds that—

(1) the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment;

(2) for the purpose of abolishing dual school systems and eliminating the vestiges thereof, many

local educational agencies have been required to reorganize their school systems, to reassign students, and to engage in the extensive transportation of students;

(3) the implementation of desegregation plans that require extensive student transportation has, in many cases, required local educational agencies to expend large amount of funds, thereby depleting their financial resources available for the maintenance or improvement of the quality of educational facilities and instruction provided;

(4) transportation of students which creates serious risks to their health and safety, disrupts the educational process carried out with respect to such students, and impinges significantly on their educational opportunity, is excessive;

(5) the risks and harms created by excessive transportation are particularly great for children enrolled in the first six grades; and

(6) the guidelines provided by the courts for fashioning remedies to dismantle dual school systems have been, as the Supreme Court of the United States has said, "incomplete and imperfect," and have not established, a clear, rational, and uniform standard for determining the extent to which a local educational agency is required to reassign and transport its students in order to eliminate the vestiges of a dual school system.

(b) For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the

vestiges of dual school systems, except that the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States.

Pub.L. 93-380, Title II, § 203, Aug. 21, 1974, 88 Stat. 514.

20 U.S.C. § 1704. Balance not required

The failure of an educational agency to attain a balance, on the basis of race, color, sex, or national origin, of students among its schools shall not constitute a denial of equal educational opportunity, or equal protection of the laws.

Pub.L. 93-380, Title II, § 205, Aug. 21, 1974, 88 Stat. 515.

20 U.S.C. § 1705. Assignment on neighborhood basis not a denial of equal educational opportunity

Subject to the other provisions of this subchapter, the assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is not a denial of equal educational opportunity or of equal protection of the laws unless such assignment is for the purpose of segregating students on the basis of race, color, sex, or national origin, or the public school to which such student is assigned was located on its site for the purpose of segregating students on such basis.

Pub.L. 93-380, Title II, § 206, Aug. 21, 1974, 88 Stat. 515.

20 U.S.C. § 1707. Population changes without effect, per se, on school population changes

When a court of competent jurisdiction determines that a school system is desegregated, or that it meets the constitutional requirements, or that it is a unitary system, or that it has no vestiges of a dual system, and thereafter residential shifts in population occur which result in school population changes in any school within such a desegregated school system, such school population changes so occurring shall not, per se, constitute a cause for civil action for a new plan of desegregation or for modification of the court approved plan.

Pub.L. 93-380, Title II, § 208, Aug. 21, 1974, 88 Stat. 516.

In the Supreme Court of the United States

OCTOBER TERM 1976

No. 76-200

TEXAS EDUCATION AGENCY
(AUSTIN INDEPENDENT SCHOOL DISTRICT), *et al*,
Petitioner

v.

UNITED STATES OF AMERICA, *et al*,
Respondents

MEXICAN AMERICAN LEGAL DEFENSE &
EDUCATIONAL FUND, *et al*,
Intervenors-Respondents

DEDRA ESTELL OVERTON, NATIONAL
ASSOCIATION FOR THE ADVANCEMENT OF
COLORED PEOPLE, *et al*,
Intervenors-Respondents

Mexican American Intervenors' Brief in Opposition to Petition for Writ of Certiorari

to the United States Court of Appeals for the Fifth Circuit

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IN THE
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NO. 76-200

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Intervenors-Respondents

MEXICAN AMERICAN INTERVENORS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Respondent, Mexican American Intervenors respectfully request this court to deny the petition for a writ of certiorari filed herein by the Austin Independent School District.

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit has issued two substantive opinions in this litigation. The first opinion is reported at 467 F_2 848 (1972) (en banc). The second opinion, which incorporates the factual findings of the first opinion, is reported at 532 F_2 380 (1976). The District Court opinions, which are unreported, may be found at pp. 44, 58 and 74 of the Appendix to the Petitioner's Petition for Certiorari.

QUESTIONS PRESENTED

1. Whether, on facts similar to those found to constitute de jure segregation in Denver (Keyes v. School District No. 1, 413 U.S. 189 (1973)), but indeed more extensive, the Fifth Circuit properly found the Austin Independent School District guilty of de jure segregation of Mexican American students.

2. Whether the Fifth Circuit properly overruled a District Court ruling to exclude Kindergarten through Grade Five children from any desegregation when there had been (a) a

finding of de jure segregation of such children, and (b) the only testimony in support of such exclusion was a naked assertion by the superintendant that he considered busing at such an age to be educationally unproductive.

STATEMENT OF THE CASE

On August 7, 1970, the United States filed suit pursuant to 42 U.S.C. 2000c-6(a) and (b) and the Fourteenth Amendment against the School District alleging that it was discriminating against Mexican American students by its student assignment policies which resulted in the segregation of such children from Anglos. The United States further alleged that the School District had not dismantled its statutorily imposed dual system as to Blacks despite this Court's decision rendered sixteen (16) years prior thereto in Brown I. On June 28, 1971 the District Court ruled that there had been no de jure segregation of Mexican Americans, but that some vestiges of the statutorily imposed segregation of Black children remained. (Petitioner's Appendix 74).

On July 19, 1971 the District Court

entered an order implementing a plan which purported to desegregate Black children by: (a) closing both of the Black secondary schools and busing those children across town to predominately Anglo schools, and (b) leaving all elementary students in their segregated neighborhood schools but establishing various contacts between students for such activities as field trips. It was estimated by the School District that these contacts would result in integrated learning experiences for twenty-five (25%) percent of the students' time in school. (Petitioner's Appendix, 58).

On August 2, 1972 the United States Court of Appeals for the Fifth Circuit reversed the District Court's finding that there had been no de jure segregation of Mexican Americans. The Court further ruled that the plan adopted for Blacks was improper. 467 F_2 848 (1972) (En Banc). The School District's representation of this decision as a decision by six of fourteen judges is incorrect. All fourteen judges concurred that the District Court should be reversed for its failure to find de jure segregation of Mexican Americans and for its

approach to desegregating Black children.[1/] It was only with respect to remedial directions to the District Court that the fourteen judges divided.

Upon remand, the District Court required a further trial of the issue of liability for the segregation of Mexican American children. This was due nominally to the intervening decision in Keyes v. School District No. 1, 413 U.S. 189 (1973). The Court again ruled that there had been no de jure segregation of Mexican Americans. Further, the District Court again ordered that (a) the Black secondary schools be closed, and (b) that a school district plan exempting Kindergarten through Grade Five from desegregation was acceptable. The only concession by the District Court to the mandate of the Court of Appeals was to integrate Blacks at Grade Six. Mexican American children were again left in their segregated facilities.

This decision was appealed by the United States and by the Mexican American

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[1/] See especially the first paragraph of the concurring opinion. 467 F_2 848, 883.

and Black intervenors. On May 13, 1976, a three judge panel of the Fifth Circuit again reversed the District court. Weighing the facts previously considered en banc and supplemented by the facts developed on remand against the intervening decision in Keyes, supra, the Court again ruled that the School District was guilty of intentional segregation of Mexican American children. The court further held that the plan leaving Kindergarten through Grade Five segregated was improper. A request for a rehearing en banc was denied and this petition ensued.

ARGUMENT

A. This Is A Classical Northern-style Desegregation Case That Is Not In Any Way Dependant Upon A Holding That The Neighborhood School Is Unconstitutional

The Petitioners would incorrectly have this Court believe that the Fifth Circuit ruled the neighborhood school unconstitutional. Nothing could be further from the truth. This case initially proceeded upon the assumption that affirmative acts and omissions causing and intending to cause the segregation of Mexican American children

were a predicate to a finding of unconstitutional de jure segregation. The evidence, twice presented and twice evaluated by the Court of Appeals, substantiates that there were significant and pervasive intentional acts of segregation against Mexican American children. This evidence is similar to that which has been held throughout the circuits to constitute de jure segregation, and is similar to the evidence presented in Denver and considered by this Court in Keyes, supra. It is only because there is a District Court in the instant case which has done all in its power to avoid ordering desegregation that this case was not resolved long ago, and the School District finally and peacefully integrated.

As previously noted, it is necessary to read the most recent decision of the Court of Appeals (532 F_2 380 - Austin II) in conjunction with its first decision (467 F_2 848- Austin I) in order to fully understand the factual basis for the court's determination that Mexican American children have been intentionally segregated. The Court in Austin II obviously saw little point in repeating its discussion of the facts. We now discuss

briefly some of those facts found by the Court in Austin I.

Historically, a primary vehicle for maintaining a separation of Anglos and Mexican Americans in the Austin Independent School District was the "dual overlapping zone". By this device, two schools, one Anglo and one Mexican American, would share a common boundary. Anglos would then go to the Anglo school and Mexican Americans to "their" school. The only dual overlapping zones found in the A.I.S.D. were between Anglo and Mexican American schools. Clearly this unique deviation from the neighborhood school plan raises a clear inference of segregatory intent. See discussion in Austin I 467 F_2 at 866-67.[2/]

[2/] The "dual overlapping zone" is essentially identical to the "optional zone" frequently found by lower courts to be a segregative device. See, eg. Morgan v. Kerrigan, 509 F_2 580, 589 (2nd Cir. 1974) cert. den. 95 S.Ct. 1950 (Boston), Brinkman v. Gilligan, 503 F_2 684, 695-96 (6th Cir. 1974) (Dayton), U.S. v. Board of School Comm. of Indianapolis, 474 F_2 81, 86 (7th Cir. 1973) cert. den. 93 S.Ct. 3066 (1973); United States v. School District of Omaha, 521 F_2 530, 540-43 (8th Cir. 1975) cert. den. 96 S.Ct. 361 (1975).

The Court in Austin I further discussed at some length the gerrymandering of school boundaries and school site selection which contributed to the segregation of Mexican American children. The Court singled out for discussion the situation surrounding the building of O'Henry Junior High School in 1953. The evidence showed that it was built as a predominately Anglo school and that in order to provide "relief" for Anglo students living in the Allan Junior High School neighborhood, the boundaries were adjusted so that many of these students could attend O'Henry. The predictable result was to further isolate Mexican American students. 467 F_2 at 867. The court noted a similar occurrence surrounding the dispersal of students at the University Junior High School site after it was reclaimed by the University of Texas. Appendix "C" to the Austin I decision provides a further picture of intentional segregation through site selection. This chart describes the ethnic make-up of all schools which opened after 1954. Twenty-four (24) of thirty (30) schools opened with an enrollment in excess of 90% Anglo or minority. (467 F_2 at 882). This unbroken pattern, as

observed by the Austin I Court, raises a strong inference of intentional segregation of minority children.[3] Nothing in the record successfully rebuts this inference.

Adding further to the above-stated evidence of intentional segregation, the Court observed that its review of school boundary lines corresponded with ethnically and racially segregated neighborhoods. 467 F_2 at 863, n. 22. This further buttresses the inference of intentional gerrymandering.

Various courts have found faculty segregation especially probative on the issue of intent since it is so fully within the power of the school district to control.[4]

3/ This Court has several times noted the segregative power that school boards have through the use of site selection. Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1, 21 (1971), Keyes v. School District No. 1, 413 U.S. 189, 201-202 (1973).

4/ This court observed in Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1, 18 that "Independent of student assignment where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff --- a prima facie case of violation of substantive constitutional

Appendix "A" to the Austin I decision shows that Mexican American faculty members were generally assigned to predominately minority schools. While Mexican Americans constituted only three (3%) percent of the total professional staff of the School District,[5] fifteen (15%) percent of the teachers at predominately minority Johnston High School were Mexican American. Indeed, fifteen (15), of the twenty-three (23) Mexican American High School teachers taught at Johnston, although Johnston only constituted one (1) of eight (8) high schools. At the elementary school level, Mexican American teachers are found at only fourteen (14) of the District's fif-

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4/ (Continued)

rights under the Equal Protection Clause in shown". See also, United States v. Board of Comm. of Indianapolis, 474 F 81, 87 (7th Cir. 1973), cert den., 93 S.Ct. 3066 (1973); Oliver v. Michigan State Board of Education, 508 F 178, 185 (6th Cir. 1974); cert. den., 421 U.S. 963 (1975) (Kalamazoo); United States v. School District of Omaha, 421 F 530, 537-38 (8th Cir. 1975), cert. den., 96 S.Ct. 361 (1975); Kelley v. Guinn, 456 F 99 (9th Cir. 1972).

5/ At the time, Mexican American students contributed twenty (20%) percent of the District enrollment.

ty-five (55) schools and of those fourteen, only four are predominately Anglo. All of the remaining ten (10) schools at which Mexican American faculty were found had minority enrollments in excess of seventy-five (75%) percent and eight (8) had minority enrollments in excess of ninety (90%) percent.

The above-stated facts are merely some of the facts which the Circuit Court of Appeals took note of in determining the School District guilty of intentional segregation of Mexican American children. The record is replete with additional matters which the Court could have discussed.

As thus can be seen, this is a typical northern-style desegregation case that is in no wise dependent upon a finding that the neighborhood school is unconstitutional. The Petitioner's selective quotation from the opinion in Austin II gives an incorrect cast to the holdings of the Fifth Circuit by failing to discuss the very substantial factual basis for their finding of intentional segregation of Mexican American children in the Austin School District.

B. This Court Has Recently Laid To Rest Any Confusion Which May Have Previously Existed Concerning The Necessity To Prove Intent In A Desegregation Case. There Is Thus No Need For An Additional Ruling On The Same Issue.

The Petitioners have argued that there is a conflict between the Circuits concerning the need to prove intent in a desegregation context. First, the cases which the Petitioners cite do not support this contention. Secondly, to the extent that there may have been confusion on this point, it has been definitively resolved by this Court in Washington v. Davis —U.S.—, 96 S.Ct. 2040 (1976) and Pasadena City Board of Education v. Spangler, 44 U.S.L.W. 5117 (June 28, 1976). There is no need for a further decision to belabor the point that intent is an element of a desegregation claim based upon 42 U.S.C. 1983 or the Fourteenth Amendment.

This holding in these two cases is, of course, in keeping with the holding by the Circuit Court in the instant case. The Court rejected the intervenor's contention that Keyes, supra, did not require a finding of intent, citing from its previous decision

in Morales v. Shannon, 516 F_2 411, 412-413 (5th Cir.,1975), cert. den. —U.S.—, 96 S.Ct. 566 (1975) that,

> [W]ith respect to the first issue, segregatory intent, we are governed by Keyes . . . , which supervened our holding in Cisneros . . . , to the extent that Keyes requires, as a prerequisite to a decree to desegregate a de facto system, . . . proof of segregatory intent as a part of state action. 532 F_2 380, 387.

What the petitioners really seem concerned about is that intent, under this decision, may be proven by circumstantial evidence. They would seemingly require an admission of segregatory purpose by all involved in order to meet this element of proof. As Justice Stevens noted in his concurring opinion in Washington v. Davis, 48 L.Ed.$_2$ 597, 615,

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the

> subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequence of his deeds.

As observed by the court in Hart v. Community School Board of Education, New York School District #21, 512 F_2 37, 50, (1st Cir., 1975) most citizens would be "as reluctant to admit that they have racial prejudice as to admit that they have no sense of humor".

The cases cited by the Petitioners as presenting a conflicting view really do not do so. The rule in the Ninth Circuit, as represented, is clearly that intent is an element of a claim for unconstitutional segregation. That too would seem to be the rule in the Second, Sixth and Eighth Circuits, which are cited for the proposition that intent is not an element of a desegregation claim. In each of the cases cited, the Court spent considerable time reviewing the evidence to determine whether segregatory intent could be inferred. In Hart, supra, the Court found that there had been questionable boundary changes and use of feeder

patterns, 512 F_2 37, 46. In United States v. School District of Omaha, 521 F_2 530, 537-546 (8th Cir., 1975), cert. den. 96 S.Ct. 361 (1975), the second case cited by Petitioners, the Court found that faculty assignment had been discriminatory, that student transfers had been utilized to permit segregation of the races, that optional attendance zones had been used as in Austin, and that school site selection had led to significant and unnecessary segregation; on the basis of these facts, the court presumed segregative intent which was not rebuted by the school district. In the other case cited by the Petitioners, Berry v. School District of Benton Harbor, 505 F_2 238 (6th Cir., 1974), the Court found that various facts, such as racially imbalanced faculties, raised an inference of intentional segregation; thus the court remanded for further proceedings.

To the extent that any of the cases cited by the Petitioners reflect an ambiguity on the issue of intent, it must now be recognized that this court's decisions in Washington v. Davis, supra, and Pasadena School Board v. Spangler, supra, remove the basis of any such ambiguity. It is a waste

of this court's resources to reaffirm two decisions decided just last term.

C. The Circuit Court Of Appeals Was Clearly Correct In Reversing An Order Which Kept Black Children Segregated In Grades Kindergarten Through Five.

At the outset, it should be noted that the plan adopted by the District Court, and held to be constitutionally insufficient by the Fifth Circuit, only purported to desegregate Black children; given the finding, twice made by the Court of Appeals that Mexican American children had been the victims of de jure segregation, it was and is clear that the plan adopted by the District Court had to be completely revised.

Secondly, contrary to the inference in the petition, the Court of Appeals did not order into effect a plan developed in New York or elsewhere. The Court remanded this aspect of the case to the District Court with the following directions,

> We suggest that the District Court consider appointing a master to draft a comprehensive tri-ethnic desegregation plan consistant with

> the opinion and the decisions of the United States Supreme Court. The plan should conform to one of the approaches outlined by Dr. Finger in his written submission of August 14, 1972 and in his testimony. 532 F_2 380, 399.

This is a rather flexible direction given the fact that this was the second time that the Court of Appeals had ruled almost identical approaches adopted by the District Court constitutionally insufficient.

The thrust of the Petitioner's argument on this issue is that the School District provided the District Court factual support for finding that the continued segregation of Black children in six grades met the conditions set forth in Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1 (1975). A thorough review of the record belies this contention. Rather than present any significant evidence that geographic or other conditions unique to Austin precluded desegregation of these children, the school district relied on general testimony by Dr. Davidson, the Superintendant, that he did not consider

busing of such children to be educationally advantageous. Indeed, a blanket exclusion of six grades could not be expected to rest on anything more than a general opposition to a busing approach.

While clearly under this court's decisions the practicalities of desegregation must be taken into consideration, and in some situations, one race schools may be permissible, the School District is under a heavy burden to justify such continued segregation. Swann, supra, 402 U.S. 1, 26. Given an uncontroverted history of statutorily imposed segregation of Black children, the blanket exclusion of six grades from desegregation on the naked assertions of disagreement with the educational merit of busing can not meet this burden. The Circuit Court clearly was correct in finding the District Court's adoption of the A.I.S.D. plan improper.

The argument by Petitioners that the inclusion of Grades Kindergarten through Five in a desegregation plan violates congressional policy is contrary to the facts. 20 U.S.C. 1702 (a) (5) cited for this pro-

position, states that "Congress finds that the risks and harms created by excessive transportation are particularly great for children enrolled in the first six grades" (emphasis added). In 20 U.S.C. 1702 (a) (4), Congress defines "excessive transportation" in language similar to this Courts' Swann limitation. "Excessive transportation" is defined as that which "creates serious risks to their [student] health and safety, disrupts the educational process carried out with respect to such students, and impinges significantly on their educational opportunity". (emphasis added). The record in no way supports a conflict with this congressional policy.

CONCLUSION

For the above-stated reasons, Respondent Mexican American Intervenors respectfully request this court to deny the Petition for Certiorari.

Respectfully Submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1976

NO. 76-200

TEXAS EDUCATION AGENCY
(Austin Independent School District), et al,
Petitioner

V.

UNITED STATES OF AMERICA, et al,
Respondents
MEXICAN-AMERICAN LEGAL DEFENSE & EDUCATIONAL FUND, et al,
Intervenors-Respondents
DEDRA ESTELL OVERTON, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al,
Intervenors-Respondents

PETITIONER AUSTIN INDEPENDENT SCHOOL DISTRICT'S REPLY BRIEF

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ATTORNEYS FOR PETITIONER

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V.

UNITED STATES OF AMERICA, et al,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER AUSTIN INDEPENDENT SCHOOL DISTRICT'S REPLY BRIEF

Petitioner, Austin Independent School District, pursuant to Rule 24, respectfully files this reply to the Brief

for the United States and the Brief for the Mexican-American Intervenors (MALDEF).

Petitioner welcomes the Government's decision not to oppose the granting of the Petition for Certiorari in this case. Petitioner further welcomes the Government's agreement (Br. 6-7) that, "if the language of the panel [of the Court of Appeals] is taken at face value," the panel has "abolished the distinction" between "*de jure* segregation" and "*de facto* segregation." The Government also agrees (Br. 7) that "the panel has neglected to make a crucially important distinction that is necessary to determine when discriminatory intent may be inferred from racially disproportionate effects" and (Br. 13) that the panel's opinion "appears to conflict with holdings of many other courts of appeals" and, if uncorrected, "may inject unnecessary uncertainty into school litigation in the Fifth Circuit." Surely, we submit, these aspects of the decision below are, of themselves, sufficient reasons to grant the petition for review.

Petitioner cannot agree, however, with the Government's assertion that the opinion below is not "necessarily" (Br. 5) read as constitutionally prohibiting the use of neighborhood assignment in areas of racial or ethnic residential concentration. As shown in the Petition (Pet. 10-16), the opinion cannot reasonably be read in any other way. The opinion explicitly states that "school authorities may not constitutionally use a neighborhood assignment policy creating segregated schools in a district with ethnically segregated residential patterns." (Pet. App. 20) This is not, as the Government (Br. 4-5) and MALDEF (MALDEF Br. 12) would suggest, a casual or isolated statement, but is the essential foundation of the Court's decision, repeated in various forms throughout

the entire opinion. For example, the Court of Appeals considered it a "basic misconception" that not all school racial or ethnic concentration is constitutionally prohibited. (Pet. App. 19) Further, the Court's opinion offers no valid other basis for its reversal of the District Court's decision. As already noted, the Government, with some apparent inconsistency, agrees in the end that the Court of Appeals "neglected to make a crucially important distinction" (Br. 13) in its finding of unconstitutional segregation of Mexican-American students.

Petitioner further disagrees with the Government's attempt to find support for the Court's decision in a footnote reference by the Court to an earlier opinion in *Austin I*. The reference is to a minority opinion and in any event that opinion — expressly rejecting discriminatory intent "as a prerequisite to establishing an equal protection violation" — itself applied an erroneous legal standard in finding unconstitutional segregation of Mexican-American students. The Government's statement that "all 14 judges" who participated in *Austin I* "concluded that the AISD had discriminated against blacks and Mexican-Americans" is plainly in error; six judges did so conclude, using an erroneous standard, but the remaining eight judges refused to join the opinion of these six judges. The majority agreed, of course, as the Government notes (Br. 10) that "the dual school system and all discriminatory segregation against Mexican-American and black students [must] be eliminated 'at once.'" The majority was clearly of the opinion, however, that, as to Mexican-Americans, the existence of a dual system had not been shown, and remanded the case for the taking of additional evidence on that issue, specifically instructing the District Court that its power to

require a remedy "will depend first upon a finding of the proscribed discrimination in the school system." 467 F.2d at 884. Further hearings were then held, and the District Court found no unconstitutional segregation of Mexican-Americans. By relying on the present panel's footnote reference to a minority opinion in *Austin I*, the Government (and MALDEF) is in effect arguing that the District Court's fact findings were held clearly erroneous before they were made.

Apparently doubting the persuasiveness of its "interpretation" of the Court of Appeals' opinion, the Government further argues (Br. 10), in the alternative, that "the evidence is sufficient to support the finding of discrimination [against Mexican-Americans], and that this alternative ground is sufficient to support the judgment of the court of appeals, whether or not the court relied upon it." The Government asserts this though it recognizes (Br. 10-11) "that some of the evidence concerning discrimination is old, that some of the effects of the discrimination may long since have dissipated, and the district court concluded that Petitioners did not act with discriminatory intent." (Br. 10-11) This brief is not the place to enter into a discussion of the evidentiary determinations involved in the issue of discriminatory intent, but the fact is that every alleged instance of discrimination against Mexican-Americans was refuted by the School District and was twice found by the District Court to be unproved. The Court of Appeals has neither stated nor shown that the District Court's findings are clearly erroneous. In these circumstances, the Government's suggestion that this Court should affirm the decision of the Court of Appeals, although rejecting the basis for that decision, is clearly unsupportable.

MALDEF (MALDEF Br. 6) apparently agrees with Petitioner and the Government that holding "the neighborhood school unconstitutional" *per se* where racial imbalance results cannot be supported. Unlike Petitioner and the Government, however, MALDEF finds (MALDEF Br. 6) that "nothing could be further from the truth" than that this is what the Court of Appeals in fact held. MALDEF's extensive, argumentative and one-sided (and inaccurate) discussion of the evidence[1] (Br. 8-12) serves only to reinforce Petitioner's contention that the findings of the District Court on that question cannot properly be found clearly erroneous by this Court.

Although initially insisting that the Court of Appeals' opinion cannot be read as in effect eliminating discriminatory intent as an element of *de jure* segregation, MALDEF later virtually concedes (MALDEF Br. 13) that it can be so read. Again unlike the Petitioner and the Government, however, MALDEF sees no need for this Court to correct this crucial error, because, it believes, "this Court has recently laid to rest any confu-

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[1]On page 3 of their brief, the MALDEF Intervenors make the statement that the only testimony in support of such exclusion [extensive transportation to additionally desegregate kindergarten through fifth grade students] was a naked assertion by the Superintendent and that he considered busing at such an age to be educationally unproductive. Such a statement ignores the extensive evidence contained in the 1973 hearing and the even further extensive evidence, specifically relied upon by the District Court, from educational experts in the original hearing. In addition, on page 2, the MALDEF Intervenors incorrectly state that the 1976 opinion by the Court of Appeals incorporates the factual findings of the first opinion. Nowhere can this be found in the Court of Appeals' opinion.

sion which may have previously existed concerning the necessity to prove intent in a desegregation case." (MALDEF Br. 13) The issue, as pointed out in the Petition, is that under the Court of Appeals' opinion, intent is actually irrelevant because the necessary "intent" always can be inferred from racial or ethnic imbalance alone. Such a holding is indeed contrary not only to this Court's decisions in *Washington v. Davis*, __ U.S. __, 996 S.Ct. 1040 (1976), and *Pasadena City Board of Education v. Spangler*, __ U.S. __, 96 S.Ct. 2697 (1976), the decisions cited by MALDEF, but is also contrary to this Court's opinion in *Keyes v. School District No. 1*, 413 U.S. 189 (1973). This fact, however, has not prevented the Court of Appeals from applying an erroneous standard in the present case, and there is little reason to believe it will prevent that Court and other courts from applying that erroneous standard in future cases, unless the error is specifically corrected by this Court in the context of a direct holding that unconstitutional segregation cannot be based on the use of racially neutral neighborhood schools in areas of racial or ethnic concentrations.

The Government's further suggestion that the Court could summarily clarify the governing legal standards and remand is distressing. The only way to clarify for all courts the correct legal standards in school desegregation cases is for this Court to announce and to apply these standards to a particular fact situation. Petitioner submits that this Court should not summarily affirm, for affirmance would require disregarding findings of fact that have never been held by any court to be clearly erroneous and would affirm a decision that is directly

contrary to this Court's recent holdings in *Washington, supra,* and *Pasadena, supra*.

Petitioner respectfully submits that the Petition for Certiorari herein should be granted and that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William H. Bingham, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Brief on counsel for Respondents by depositing same in the United States Mail on October _____, 1976, addressed to the Solicitor General, Department of Justice, Washington, D.C., 20530, Joe Rich, Department of Justice, Civil Rights Division, 550 11th Street, N.W., Washington, D.C., 20530, Sam Bisco, 1704 Manor Road, Austin, Texas, 78722, Gabriel Gutierrez, 1010 E. 7th Street, Austin, Texas, 78701.

No. 76-200

In the Supreme Court of the United States

OCTOBER TERM, 1976

TEXAS EDUCATION AGENCY (AUSTIN INDEPENDENT SCHOOL DISTRICT), ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–43) is reported at 532 F. 2d 380. The opinion of the district court (Pet. App. 44–57) is unreported. An earlier opinion of the court of appeals is reported at 467 F. 2d 848.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1976. A petition for rehearing was denied on June 9, 1976. The petition for a writ of certiorari was filed on August 11, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Austin Independent School District has engaged in racial discrimination against its black and Mexican-American students.

2. Whether the court of appeals erred in remanding the case for development of a plan that supplies relief from the effects of the discrimination in the elementary schools and against Mexican-American students.

STATEMENT

The United States instituted this school desegregation suit in the United States District Court for the Western District of Texas pursuant to Section 407 of the Civil Rights Act of 1964, 78 Stat. 248, 42 U.S.C. 2000c–6. On September 4, 1970, the district court entered an interim order directing the Austin Independent School District (hereafter referred to as AISD) to implement standard provisions requiring desegregating districts in the Fifth Circuit to eliminate racial discrimination in several aspects of school operations, including faculty and staff assignments, new school construction and the provision of transportation. See *Singleton* v. *Jackson Municipal Separate School District,* 419 F. 2d 1211 (C.A. 5) (*en banc*).

After a six-day trial in 1971 the district court held that AISD had not discriminated against Mexican-Americans, but that the dual school system historically maintained for blacks had not been eradicated (Pet. App. 74–84). It entered an order approving a plan that closed two predominantly black secondary schools

and reassigned their students to predominantly Anglo secondary schools (see Pet. App. 3, 58–73).[1] This plan scattered blacks of secondary school age throughout the district, but put the entire burden of transportation on blacks.

The court of appeals, sitting *en banc,* reversed. Six judges joined an opinion detailing a history of discriminatory actions by the AISD (467 F. 2d at 852–875). These six judges concluded that AISD was responsible for the separation of Mexican-Americans from Anglos in the schools, and that the district court's contrary findings were clearly erroneous. Eight other judges concurred in the result, concluding that "discriminatory segregation exists against Mexican-American students and that the proposed part-time integration plan of the school district is inadequate as a desegregation plan" (*id.* at 885). The court remanded the case to the district court with directions to identify those schools that were segregated as a result of racial or ethnic discrimination and to eliminate its effects by using specified desegregation techniques listed on a priority basis (*id.* at 884–885).[2] The six judges joining in the lead opinion dissented from this disposition of the question of remedy; they would

[1] The plan also provided for meetings of elementary level students on an integrated basis one week per month to participate in certain cultural activities (Pet. App. 23). This portion of the plan was never implemented.

[2] The majority observed that "[t]here may be * * * one race schools which are the product of neutral, non-discriminatory forces," and concluded that the racial imbalance attributable to these forces need not be corrected (*id.* at 884).

have prescribed a remedy without further evidentiary proceedings (*id.* at 871–875, 886–889).

On remand the district court once more concluded that the AISD had not discriminated against Mexican-Americans; it approved a plan submitted by the AISD for desegregating the sixth grade of black elementary schools (Pet. App. 44–57).

A panel of the court of appeals reversed and held, for the second time, that AISD had discriminated against both blacks and Mexican-Americans and that the partial desegregation plan submitted by the AISD is constitutionally insufficient. It remanded for the formulation of an appropriate plan.

DISCUSSION

1. Petitioners direct most of their argument against certain language the panel employed to justify its conclusions. They concentrate on the panel's statements (Pet. App. 16–17) that

> the AISD has intended, by its continued use of the neighborhood assignment policy, to maintain segregated schools in East and West Austin. The plaintiffs have therefore established a prima facie case of *de jure* segregation of Mexican-Americans in all portions of the school district except the residentially integrated central city area. [Footnotes omitted.]

and (Pet. App. 20) that

> school authorities may not constitutionally use a neighborhood assignment policy creating segregated schools in a district with ethnically segregated residential patterns. A segregated school system is the foreseeable and inevitable result of such an assignment policy.

These statements appear to mean that a school board has a constitutional duty to correct racial imbalance occurring because of the use of a neighborhood school policy in a district that is not racially homogeneous. Thus, petitioners contend, the question presented by this case is "quite simply" (Pet. 9) whether a racially neutral and non-discriminatory practice of assigning students to the schools closest to their homes is unconstitutional because of its racial effects. We agree with petitioners that, if the court of appeals meant this, it is wrong.

The portions of the panel's opinion we have quoted are not necessarily read as petitioners do, however. They also might mean that a "neighborhood school" policy is impermissible when it is used as a device to enforce or perpetuate the effects of previous racial discrimination in the operation of the schools. For example, if school officials discriminate in making school siting and capacity decisions, a "neighborhood school" policy may be necessary to ensure that the school serves the racial group for which it was intended. Moreover, the court of appeals simply may have been offering an alternative ground (which we believe incorrect) for a conclusion that we believe is correct—that the AISD engaged in pervasive acts of discrimination against Mexican-Americans.

We discuss in what follows both our doubts about the panel's rationale and the reasons why we believe that the judgment is correct.

a. A policy of assigning students to the closest or most convenient school serving the grade in which they are enrolled (the neighborhood school policy) is used in many school districts. Congress has declared that it is the best policy for making student assignments. Equal Educational Opportunities Act of 1974, Pub. L. 93–380, Sections 202(a)(2), 214(a), 88 Stat. 514, 517, 20 U.S.C. (Supp. V) 1701(a)(2) and 1713(a). A neighborhood school policy inevitably produces schools whose racial and ethnic composition closely reflects that of the neighborhoods in which the schools are located. To this extent, school authorities selecting a neighborhood school policy can be said to "intend" racially imbalanced schools, if the school district is not racially homogeneous.

It does not follow, however, that the neighborhood school policy amounts to racial discrimination, unless the residential patterns are caused by official acts designed to segregate the schools. An otherwise neutral action is not discriminatory solely because it has a racially disproportionate effect. *Washington* v. *Davis,* No. 74–1492, decided June 7, 1976, slip op. 7–18; *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U.S. 189, 205, 208. The essential element of the constitutional violation is "a current condition of [racial separation] resulting from intentional state action" (*id.* at 205.).

If the language of the panel is taken at face value, it has abolished the distinction between racial discrimination in the operation of the schools and its effects (*de jure* segregation) and racial imbalance

caused by other factors, and which the school authorities have not rectified (*de facto* segregation). By requiring the district court to infer intent to discriminate from the fact that the school authorities have not attempted to ameliorate the effects of racial separation in residential patterns, the panel has avoided the need to prove intent to discriminate.

Deeds often speak more loudly than words, and intent sometimes may be inferred from effects alone (see *Washington* v. *Davis, supra,* slip op. 11; *id.* at 1–2 (Stevens, J., concurring)). But for the court of appeals to compel the district court to infer intent from effects alone in situations like the present one is to abolish the intent requirement and to abolish the further requirement that the racial separation have been caused by the acts of the State intended to affect the operation of the schools (rather than, for example, the acts of private individuals choosing where to make their homes). See also *Spencer* v. *Kugler,* 404 U.S. 1027, affirming 326 F. Supp. 1235 (D. N.J.).[3]

In our view, the panel has neglected to make a crucially important distinction that is necessary to determine when discriminatory intent may be inferred from racially disproportionate effects. We submit that when the acts of school authorities (even if neutral on their face) produce more racial separation in the

[3] In *Spencer* the Court summarily affirmed the district court's holding that extreme racial imbalance, without more, does not authorize a court to revise neutrally established school district lines.

schools than there is in the residential patterns of the school district as a whole,[4] the court may properly (but need not always) infer that the school authorities acted with intent to discriminate. On the other hand, when a facially neutral neighborhood assignment policy produces no more separation than occurs in the residential patterns, only evidence that the school authorities acted with discriminatory intent will allow a finding that they practiced racial discrimination. In other words, proof that school authorities added to racial separation may be enough to support a finding of intent; proof that school authorities failed to reduce separation attributable to forces outside the schools is never (by itself) enough.[5] To the extent that the court of appeals meant to require the district court to infer intent in the former situation, or to allow it to infer intent in the latter, its decision is incorrect.

b. The judgment of the panel rests on firmer ground, however. Its analysis of the neighborhood school policy

[4] Or than there would be if schools were evenly dispersed throughout the district and contiguous attendance zones were used.

[5] The panel's contrary conclusion is apparently based upon a belief that predominantly black or Mexican-American schools are inherently inferior, regardless of the cause of the predominance, and that school authorities must rectify this inferiority or be seen to intend it. See the six-judge opinion in the *en banc* decision (467 F. 2d at 862–863 and n. 20), upon which the panel relied in part. We agree with Judge Sobeloff that there is nothing inherently inferior about all-black schools, any more than all-white schools are inferior, when the separation is not caused by state action. See *Brunson* v. *Board of Trustees*, 429 F. 2d 820, 823–827 (C.A. 4) (*en banc*) (Sobeloff, C. J., concurring).

was not responsive to the arguments of either the plaintiff United States or the intervenors. The panel itself stated that the case presents "not only the use of a neighborhood assignment policy" (Pet. App. 20) but also the employment of an extensive series of discriminatory devices that had been discussed by the *en banc* court (see 467 F. 2d at 854 n. 7, 855, 856–857, 883). It wrote (Pet. App. 16–17 n. 13):

> We held in [the *en banc* decision]
>
> > "that the AISD has, in its choice of school site locations, construction and renovation of schools, drawing of attendance zones, student assignment and transfer policies, and faculty and staff assignments, caused and perpetuated the segregation of Mexican-American students within the school system."
>
> 467 F. 2d at 865–66. We also found that "[t]he natural and foreseeable consequence of these actions was segregation of Mexican-Americans." 467 F. 2d at 863. The Supreme Court inferred segregative intent from the same kind of circumstantial evidence in *Keyes*. See 413 U.S. at 192 * * *. The inference of segregative intent that the Supreme Court made regarding the Denver school authorities is equally applicable to their counterparts in Austin.

Although the many opinions issued by the court of appeals *en banc* are not without ambiguity, we believe that they demonstrate that all 14 judges who sat on the case concluded that the AISD had discriminated against blacks and Mexican-Americans, and that some of the effects of that discrimination had not yet been

eliminated. The six-judge lead opinion (467 F. 2d at 861–870) concluded that AISD had discriminated by not eliminating racial separation, however caused. The eight-judge majority wrote that it was necessary to remand the case "with direction that the dual school system and all discriminatory segregation against Mexican-American and black students be eliminated 'at once'" (467 F. 2d at 883). Although seven of these eight judges would have preferred not to reach the merits (see 467 F. 2d at 889–890, 891), they did cast votes, and the fact that they concurred in the result reversing the district court establishes that they thought that at least some discrimination had been established. They did not, however, articulate the theory that led them to this conclusion. Part of that obscurity has survived; although the panel (which included one judge from the eight-judge majority of the *en banc* court) asserted (Pet. App. 4) that "[t]he en banc Court divided only on the issue of remedy", it did not discuss the possibility that the 14 judges may have been using different theories to support their conclusions, or that these different theories may lead to different remedial plans.

Despite this opacity in the opinions of the court of appeals, we believe that the evidence is sufficient to support a finding of discrimination, and that this alternative ground is sufficient to support the judgment of the court of appeals, whether or not the court relied upon it. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555. We say this recognizing that some of the evidence concerning discrimination is old, that some of the effects of the discrimination may long since have dissipated, and that the district court concluded that petitioners did not act with discriminatory intent. The district court's finding with respect to intent is, we believe, clearly erroneous; and the other difficulties in the evidence go not to the existence of discrimination but to the remedy that is necessary and appropriate to eliminate its lingering effects—a matter to be addressed on remand from the present court of appeals decision.

The extensive evidence presented during two lengthy hearings of discriminatory practices is summarized school-by-school in the brief for the United States in the court of appeals.[6] Prior to 1954 certain schools were designated for Mexican-Americans in much the same manner that other schools were designated for blacks, although only the latter designation was required by state law. 467 F. 2d at 886–887. From 1954 until the date of trial petitioners continued to operate a segregated school system by perpetuating the effects of pre-1954 discrimination. The school authorities also undertook a series of actions designed to perpetuate the concentration of Mexican-Americans into a few schools. 467 F. 2d at 867–868, 870. They created dual-overlapping zones comprising two schools; Anglos were expected to attend one of the schools, Mexican-Americans the other. They built new schools deep inside Mexican-American neighborhoods, with a capacity such that the schools served only the

[6] We are lodging a copy of that brief with the Clerk of the Court.

Mexican-American neighborhood and were overwhelmingly Mexican-American on opening. Other locations that would have produced more balanced enrollments were rejected. School boundaries were manipulated so that pockets of Anglo students near or in Mexican-American neighborhoods attended predominantly Anglo schools. Teachers were assigned on a patently discriminatory basis. We submit that the evidence amply supports a conclusion that petitioners availed themselves of a neighborhood school assignment system only when that would produce the maximum feasible separation of Anglos from Mexican-Americans; when it did not, the AISD resorted to gerrymandering, discriminatory school siting and capacity decisions, dual-overlapping zones, and other familiar discriminatory devices of the sort condemned in *Keyes*.

The court of appeals therefore may have meant no more in its discussion of neighborhood schools than that a school district cannot absolve itself of responsibility for its discrimination by hiding behind a claim that it *now* has a firm policy of assigning students to neighborhood schools. When that policy has been used in concert with obvious tools of discrimination, it may come to partake of a discriminatory quality and be an instrument of discrimination itself. A neighborhood school policy is an enforcement tool of a policy of discrimination in some circumstances; to use the example given earlier, it ensures that students attend the school designed, located, and built to a particular capacity expressly to be able to serve only students of one race or ethnic group. If this is all the

court of appeals meant, we have no quarrel with it.

c. If the Court were to undertake plenary review of this case, we would urge that the judgment of the panel be affirmed, in light of the evidence of extensive intentional discrimination against Mexican-Americans. Cf. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 88. But we are concerned that the panel's language, which appears to conflict with holdings of many other courts of appeals (see Pet. 21–22), may inject unnecessary uncertainty into school litigation in the Fifth Circuit. We therefore do not oppose the granting of the petition. It may be useful for this Court to clarify the governing legal standards (perhaps summarily, as it did in *Dillingham* v. *United States*, 423 U.S. 64) and to remand for appropriate disposition of the case by the court of appeals, in light of the views we have outlined here and the intervening decision in *Washington* v. *Davis*, *supra*.

2. Petitioners argue (Pet. 23–31) that the panel should not have remanded the case for the formulation of a new remedial plan. If, as we have argued, however, the panel correctly concluded that the district court had erred in holding that there had been no discrimination against Mexican-Americans, it follows that a remand is required for the formulation of a remedy that would eliminate the lingering effects of that discrimination. No more need be said to demonstrate the propriety of at least a limited remand.

Petitioners contend, however, that the "practicalities" of the situation support the plan adopted by the district court, which involved no alteration of attend-

ance patterns in any grade except the sixth. The district court viewed the secondary schools as "totally desegregated" (Pet. App. 21) and concluded that transportation of students attending kindergarten through the fifth grade would be deleterious and impractical. We agree with the panel that the district court erred—both because of its failure to recognize discrimination against Mexican-Americans and because it has long been established that plans exempting whole grade levels are unacceptable. See, *e.g., Flax* v. *Potts,* 464 F. 2d 865, 869 (C.A. 5).

We also agree with the opinion of eight judges of the *en banc* court (see 467 F. 2d at 884) that the goal of a remedial order in a school desegregation case should be to put the school system and its students where they would have been but for the violations of the Constitution. The goal is, in other words, to eliminate "root and branch" the violations and all of their lingering effects. *Green* v. *County School Board,* 391 U.S. 430, 438. It is to eliminate these effects wherever they may be found in the school system, starting from the common understanding that "racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions" (*Keyes, supra,* 413 U.S. at 203).

In our view, "desegregation" is nothing more or less than elimination of *de jure* segregation, "root and branch." The "desegregation" that courts are both empowered and obligated to accomplish is not the elimination of all of the racial separation without regard to its causes, whether *de jure* acts or *de facto*

social processes. The existence of schools predominantly attended by members of one race does not in itself amount to racial discrimination; if it were otherwise, there would be no meaning to the requirement of "state action" as a precondition to a violation of the Fourteenth Amendment. The attributes that make a system a dual system can often be eliminated without an insistence upon a racial composition in each school that in some degree reflects the racial composition of the school district as a whole. This is the critical line between racial discrimination and its effects, on the one hand, and mere difference of racial composition of attendance, on the other.[1]

The proper approach therefore requires a court to seek to determine the consequences of the acts constituting the illegal discrimination and to eliminate their continuing effects. A conclusion that there has been discrimination with respect to particular schools does not support a judicial order that racial balance must be produced throughout the school system. This follows directly from principles long accepted by this Court. "In fashioning and effectuating the [desegregation] decrees, the courts will be guided by equitable

[1] So long as school authorities operate "just schools" instead of one set of schools for blacks and another set for whites, it matters not at all whether one particular school has more blacks than whites. The schools of Vermont are not segregated even though most of them are all white. The Fourteenth Amendment does not prefer black schools, white schools, or racially balanced schools—it demands, instead, a policy of neutrality in which neither merit nor demerit is assigned on the basis of color, except insofar as is necessary to rectify the effects of past distinctions made on this impermissible basis. Cf. *Milliken* v. *Bradley,* 418 U.S. 717.

principles." *Brown* v. *Board of Education*, 349 U.S. 294, 300. The task of an equitable decree is to correct the condition that offends the Constitution. A finding of a violation does not set a court of equity at large to produce results that never would have occurred if all constitutional provisions had been observed. The court must instead order whatever steps are necessary for "disestablishing state-imposed segregation" (*Green*, *supra*, 391 U.S. at 439).

As the Court emphasized in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15: "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation." To this end, there is broad equitable power "to remedy past wrongs" (*ibid.*). But the task is not to produce a result merely because the result itself may be attractive. "The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution. * * * As with any equity case, the nature of the violation determines the scope of the remedy" (*id.* at 16). "[T]he remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct" (*Milliken* v. *Bradley*, 418 U.S. 717, 746). Cf. *Franks* v. *Bowman Transportation Co.*, No. 74-728, decided March 24, 1976, slip op. 23.[8]

[8] *Hills* v. *Gautreaux*, No. 74-1047, decided April 20, 1976, is not to the contrary. The Court there specifically relied on the circumstance that "[t]he relevant geographic area for purposes of the respondents' housing options is the Chicago housing market, not the Chicago city limits" (slip op. 14).

This Court's cases, then, support our position. And they also support the judgment of Congress in the Equal Educational Opportunities Act of 1974 that "[i]n formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court * * * shall seek or impose only such remedies as are *essential to correct particular denials* of equal educational opportunity or equal protection of the laws" (Section 213, 88 Stat. 516, 20 U.S.C. (Supp. V) 1712; emphasis added).[9]

The application of these principles to the case at hand requires a remand for formulation of a more comprehensive plan. This is not a case where a school board made an effort to devise a plan related to the scope of the violation. The *en banc* court unanimously rejected a similarly incomplete plan and directed petitioners to proceed "to eliminate the dual school system as it has existed in Austin together with any and all discriminatory segregation which exists against Mexican-Americans and black students" (467 F. 2d at 884). AISD and the district court neglected this command. Petitioners' asserted practicalities are "vague, conclusory and unsupported" (Pet. App. 24), and they are hardly sufficient to justify confining the plan to a single grade.

This case is now more than six years old, and it is understandable that the court reversed the district's court's selection of the AISD plan and criticized its

[9] See generally Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cin. L. Rev. 199 (1971). Cf. Fiss, *The Jurisprudence of Busing*, 39 L. and Contemp. Prob. 194 (1975).

refusal to give serious consideration to the only plan in the record (the Finger Plan) purporting to deal with the effects of the discrimination. In light of the history of this case, the court of appeals had little alternative but to order the district court either to implement the Finger Plan or to appoint "a master to draft a comprehensive tri-ethnic desegregation plan consistent with this opinion and the decisions of the United States Supreme Court" (Pet. App. 36). An order to devise a plan consistent with this Court's decisions does not warrant this Court's review.

CONCLUSION

For the reasons stated at pages 6–13, *supra,* we do not oppose the granting of the petition for a writ of certiorari.

Respectfully submitted.

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